Supreme Court, U.S.
FILED

No. 02 278 AUG 2 0 2002

OFFICE OF THE CLERK

In The
# Supreme Court of the United States

R.J. WALSER, PAUL WALSER, ANDREW WALSER, WALSER AUTO SALES, INC. AND MOTORWERKS, INC.,

*Petitioners,*

v.

THE HOUSING AND REDEVELOPMENT AUTHORITY IN AND FOR THE CITY OF RICHFIELD,

*Respondent.*

**On Petition For Writ Of Certiorari To The Minnesota Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER J. DIETZEN
LARKIN, HOFFMAN, DALY & LINDGREN, LTD.
Suite 1500
7900 Xerxes Avenue South
Bloomington, MN 55431
Telephone: (952) 835-3800

BRADLEY J. GUNN
*Counsel of Record*
LEONARD, STREET AND DEINARD, P.A.
Suite 2300
150 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 335-1500

BRUCE D. MALKERSON
*Of Counsel*
HOWARD A. ROSTON
*Of Counsel*
MALKERSON GILLILAND MARTIN LLP
1750 Pillsbury Center
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 344-1111

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

160 pp

## QUESTIONS PRESENTED

I. The Richfield Housing and Redevelopment Authority condemned two successful automobile dealerships from the Walser family and transferred the property to Best Buy Co. for its new corporate headquarters. Did the taking by the Housing and Redevelopment Authority violate the Public Use Clause of the Fifth Amendment of the United States Constitution?

II. Does the highly deferential standard of review set forth in *Berman v. Parker,* 348 U.S. 26 (1954), apply in a condemnation action such as this where there were *no* municipal findings to support the allegation of "blight," and where it appeared that the stated purpose for the taking was pretextual?

## RULE 14.1 AND 29.6 STATEMENT

The parties to the proceeding below who seek review by this Court are R.J. Walser, Paul Walser, Andrew Walser, Walser Auto Sales, Inc. and Motorwerks, Inc. Walser Auto Sales, Inc. and Motorwerks, Inc. have no parent corporations and no publicly held company owns ten percent or more of their stock.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| RULE 14.1 AND 29.6 STATEMENT | ii |
| TABLE OF AUTHORITIES | v |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE PETITION | 8 |
| A. This Court's Decision in *Berman v. Parker* Limited the Authority of Courts to Review the "Public Use" Requirement in Cases Involving the Elimination of Slums or Blight. Since 1954, However, Municipalities Have Increasingly, and Successfully, Relied on the Language in *Berman* and Its Progeny to Argue That the Courts Are Virtually Required to "Rubber Stamp" Any Condemnation for the Alleged Purpose of Redevelopment. Further Review by This Court Is Necessary to Address Municipal Abuses Resulting From This Court's Precedent | 8 |
| B. Review by This Court Is Particularly Necessary Because the Deferential Standard Afforded Condemning Authorities Should Not Apply in Cases Such As This Where (1) The HRA Made No Findings of Blight Before Commencing Condemnation and (2) the Stated Rationale for the Taking Is Pretextual | 12 |

TABLE OF CONTENTS – Continued

Page

CONCLUSION ..... 14

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page

CASES

*Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) .....14

*Berman v. Parker*, 348 U.S. 26 (1954).....*passim*

*Cincinnati v. Vester*, 281 U.S. 439 (1930).....10

*City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986)..... 9

*City of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. Ct. App. 1987) .....14

*Condemnation of 110 Washington Street*, 767 A.2d 1154 (Pa. 2001).....11

*Dolan v. City of Tigard*, 512 U.S. 374 (1994).....13

*Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).....10

*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).....10

*Housing & Redev. Auth. v. Minneapolis Metro. Co.*, 104 N.W.2d 864 (Minn. 1960) ..... 9

*Housing and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002) ..... 1

*Housing and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001).....1, 7

*Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905).....10

*Mayor v. C.N. Thomas*, 645 So. 2d 940 (Miss. 1994).....11

TABLE OF AUTHORITIES – Continued

Page

*National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) ..... 9, 10

*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ..... 14

*Redevelopment Auth. of the City of Erie v. Owners or Parties in Interest*, 274 A.2d 244 (Pa. 1971) ..... 11

*Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923) ..... 9, 12

*Southwestern Illinois Dev. Auth. v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) ..... 11

*Thompson v. Consolidated Gas Corp.*, 300 U.S. 55 (1937) ..... 10

*Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391 (Minn. Ct. App. 2001) ..... 2, 12

*Walser Auto Sales, Inc. v. City of Richfield*, 644 N.W.2d 425 (Minn. 2002) ..... 1

*Wilmington Park Auth. v. Land in the City of Washington*, 521 A.2d 227 (Del. 1986) ..... 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... 2, 10, 14

U.S. Const. amend. XIV, § 1 ..... 3

STATUTES AND RULES

28 U.S.C. § 1257(a) ..... 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

2A *Nichols on Eminent Domain*, § 7.06[26] (3d ed. 2002) ..... 9

2A *Nichols on Eminent Domain*, § 7.08[1][2] (3d ed. 2002) ..... 11

## PETITION FOR WRIT OF CERTIORARI

Petitioners, R. J. Walser, Paul Walser, Andrew Walser, Walser Auto Sales, Inc., and Motorwerks, Inc., respectfully petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court affirming the taking of their property.

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at *Housing and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002) and is reproduced in the Appendix at 1 (hereinafter "App. at 1"). The Minnesota Supreme Court divided evenly (3-3) on the public use issues argued therein,[1] thereby affirming the decision of the Minnesota Court of Appeals which is reported at *Housing and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001). (App. at 37) The order of the Hennepin County District Court granting the petition for condemnation is also reproduced in the Appendix. (App. at 52)

The Minnesota Supreme Court's opinion in the related tax increment financing matter of *Walser Auto Sales, Inc. v. City of Richfield* is reported at 644 N.W.2d 425 (Minn. 2002). (App. at 104) The Minnesota Supreme Court divided evenly (3-3) on the issues therein, thereby affirming

[1] The court's opinion addresses only whether the appeal was moot, an issue not before this Court.

the decision of the Minnesota Court of Appeals that the City's use of tax increment financing was unlawful, which decision is reported at *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391 (Minn. Ct. App. 2001). (App. at 26)

## JURISDICTION

The judgment of the Minnesota Supreme Court was entered on May 31, 2002. (App. at 105) The Petition for Rehearing to the Minnesota Supreme Court was denied on May 22, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This Petition was filed within 90 days of May 31, 2002.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation**.

U.S. Const. amend. V (emphasis added).

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis added).

## STATEMENT OF THE CASE

R. J. Walser, Paul Walser, and Andrew Walser were the fee owners of an approximately seven-acre tract of land located at I-494 and Penn Avenue in the City of Richfield, Minnesota ("City"). The property was leased to two family-owned automobile dealerships, Walser Auto Sales, Inc., and Motorwerks, Inc. The Walser family and these dealerships are collectively referred to herein as "Walsers." Members of the Walser family had owned and operated automobile dealerships at this site since the mid-1970s. Over the years, the facilities had been extensively upgraded into two very successful automobile dealerships. (App. at 53-54)

In 1997, the City received a proposal from a private developer, CSM Properties, Inc. ("CSM"), to redevelop the Walsers' property and other neighboring commercial and residential properties (the "CSM Proposal"). The CSM Proposal involved approximately 42 acres of residential and commercial properties and called for public financial assistance in the form of tax increment financing. In June

1999, in order to implement the tax increment financing, the City created the "Interchange West District" on the 42 acres of property desired by CSM. A month or two later, however, CSM abandoned its proposal. (App. at 63)

Several months later, representatives of the City and the Richfield Housing and Redevelopment Authority ("HRA") entered into negotiations with Best Buy Co., Inc. ("Best Buy"). In March 2000, the HRA entered into a development agreement with Best Buy that contemplated the acquisition and demolition of all the properties in the 42-acre Interchange West District, and the construction of Best Buy's new corporate headquarters on the site (the "Project"). Under the development agreement, the HRA agreed to condemn any properties that Best Buy could not voluntarily acquire. (App. at 64)

By July 2000, Best Buy had secured commitments to purchase all of the properties within the Interchange West District except for the Walsers' property. Best Buy requested the HRA to condemn the Walsers' property, and the HRA, as required by its development agreement with Best Buy, began moving forward with the condemnation. The HRA staff report, which was prepared for the condemnation, states that Best Buy was requesting the condemnation, and that the taking "is critical to" the success of Best Buy's Project. (App. at 113-14)

In July 2000, the HRA adopted a resolution authorizing the condemnation of the Walsers' property, stating that the taking was necessary to "eliminate and prevent the development or spread of conditions of blight found to exist by the City and the HRA." (App. at 116-19) This was the first time the notion of "blight" had ever been advanced as an explanation or justification for the Best Buy

or CSM projects generally, or for the taking of the Walsers' property specifically. In fact, neither the City nor the HRA had ever found that any of the properties in the Interchange West District were blighted or threatened with blight. On the contrary:

- The City's most recent study (in 1993) found that so-called "conditions of blight" could be found in approximately 90 percent of the City, but the Interchange West District was located in the 10 percent of the City where no such conditions of blight were found to exist. (App. at 121)

- The City's own consultants, who were retained in connection with the tax increment financing qualification process, found that the properties in the Interchange West District "are generally in good condition and can't by any means, be classified as 'run-down.'" (App. at 108) In order to reach the City's "desired result," the consultants told the City that it would be necessary to use an "alternative approach." *Id.*

- The trial court that presided over the Walsers' objections to the taking found that "the properties in the Project Area are generally in good condition." (App. at 136)

- The Walsers introduced extensive and unrebutted testimony from an architect and an appraiser demonstrating that the Interchange West District was not blighted.

- The City's Director of Community Development admitted that under the HRA's definition of blight, *every neighborhood* in Richfield or Minneapolis, or anywhere else, would be considered blighted. (App. at 121)

In accordance with the procedures of Minnesota law, the public purpose for the taking was first litigated at a three-day hearing on the HRA's petition for condemnation. The Walsers contested the taking, arguing *inter alia* that the taking was not for a public purpose, that neither the Walsers' property nor the surrounding area was "blighted," and that Best Buy, and not the public, was actually the primary beneficiary of the Project. (App. at 74, 91)

The Walsers believed that the HRA's allegation of "blight" was merely a pretext for circumventing the "public use" requirement and attracting Best Buy's new corporate headquarters. The evidence that the Project was intended to accommodate Best Buy, and not to benefit the public, was extensive. As noted above, the project area was *not* blighted, and neither the City nor the HRA ever mentioned the concept of blight until after Best Buy directed the HRA to condemn the Walsers' property. Moreover, the Project itself was structured to provide Best Buy with a "windfall" of $55 million in tax increment revenues, while the public would receive little or no benefit. For example:

- The public would not even be able to use or enjoy the property in the Project, since it would be conveyed to and owned by Best Buy. This fact alone distinguishes the taking in this case from "traditional" condemnations for highways, parks, schools, etc., where the public benefit is self-evident.
- Any enhancement in the City's tax base would, with one or two minor exceptions, be "diverted" to Best Buy and not received by the public for 25 years.
- The Project was expected to increase traffic, noise, and congestion in an area that was

already dealing with those problems. (App. at 132)

- The Project destroyed an attractive and livable neighborhood with a significant amount of affordable housing. (App. at 132-34)

Notwithstanding the foregoing, on January 19, 2001, the trial court issued its Findings of Fact, Conclusions of Law, and Order Appointing Commissioners. The trial court acknowledged that the Interchange West District was generally in good condition, but it approved the condemnation, stating that "great deference must be paid to the HRA's determination that the taking of the Subject Property is necessary for a public purpose." (App. at 94)

On appeal to the Minnesota Court of Appeals, the Walsers again raised the arguments that the taking was not for a public use, that there was no blight, that the alleged blight was merely a pretext to justify the condemnation for Best Buy's Project, and that Best Buy was the primary beneficiary of the Project. *See Housing and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.,* 630 N.W.2d 662 (Minn. Ct. App. 2001). (App. at 12, 19-20) The Minnesota Court of Appeals, however, noting the deferential standard of review, on July 3, 2001, found that the trial court "did not clearly err in finding that the taking was for a public purpose." *Id.* (App. at 22)

The Minnesota Supreme Court thereafter accepted discretionary review. The Walsers once again made the same arguments they made to the Minnesota Court of Appeals. (App. at 10) The Minnesota Supreme Court divided 3-3 on these issues, and the evenly divided court

therefore issued an opinion affirming the decision of the Minnesota Court of Appeals.

## REASONS FOR GRANTING THE PETITION

### A. This Court's Decision in *Berman v. Parker* Limited the Authority of Courts to Review the "Public Use" Requirement in Cases Involving the Elimination of Slums or Blight. Since 1954, However, Municipalities Have Increasingly, and Successfully, Relied on the Language in *Berman* and Its Progeny to Argue That the Courts Are Virtually Required to "Rubber Stamp" Any Condemnation for the Alleged Purpose of Redevelopment. Further Review by This Court Is Necessary to Address Municipal Abuses Resulting From This Court's Precedent.

*Berman v. Parker,* 348 U.S. 26 (1954), arose from the desire of the United States Congress to redevelop one of the worst slums in Washington, D.C. In that case, the condemning authority conducted extensive studies finding that large percentages of the properties were beyond repair or needed major repairs, had outside toilets, no baths, no electricity, no wash basins or laundry tubs, and lacked central heating. In that case, where there were extensive findings and evidence of blight, the Court upheld the public purpose for the takings, stating that the "role of the judiciary in determining whether the power is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker,* 348 U.S. at 32.

The vast majority of state and federal courts, since this Court's decision in *Berman*, have relied upon that

decision (or the underlying rationale in that decision) to uphold takings under almost *any* circumstance involving "redevelopment." For example, in Minnesota, the *Berman* decision was cited in *City of Duluth v. State,* 390 N.W.2d 757, 763 (Minn. 1986) (stating that judicial deference to a municipality's determination that land is being condemned for a public use is "required until it is shown to involve an impossibility"). *See also Housing & Redev. Auth. v. Minneapolis Metro. Co.,* 104 N.W.2d 864 (Minn. 1960). Both of these cases, which relied upon *Berman,* were cited by the Minnesota Court of Appeals in this case as justifying the taking of the Walsers' property.

Similarly, the leading treatise on eminent domain catalogues the wide range of state and federal cases that have approved the use of eminent domain for the stated purpose of redevelopment. 2A *Nichols on Eminent Domain* § 7.06[26] (3d ed. 2002). For nearly 50 years, the lower courts have interpreted *Berman* as granting almost unfettered discretion to condemning authorities to dictate whether their own redevelopment projects are constitutional.

This Court, however, has never stated that the role of the judiciary in reviewing the constitutional issue of public use should be virtually *non-existent*. Rather, this Court, as the final arbiter of constitutional issues, has reserved to itself the ultimate authority to determine whether or not the taking is for a public use. *See Rindge Co. v. Los Angeles County*, 262 U.S. 700, 705 (1923). *See also National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422 (1992). The duty and the responsibility of the courts to make the final decision on this constitutional issue must rest on the notion that, at some point, condemning authorities' actions go too far. For more than

100 years, this Court has repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984), *citing Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159 (1896).

Because of the broad and sweeping deferential statements by this Court in cases such as *Berman* and *Midkiff*, however, condemning authorities and lower courts have routinely construed those decisions as placing virtually *no* limits on the "public use" requirement, particularly in cases involving redevelopment projects. This alone is reason to grant the Petition in this case.

We do not doubt that there are certain cases in which the public use is so clear, and so compelling, that deferential review is appropriate. For example, this Court's decision in *Berman* addressed the horrific and well-documented conditions of extreme blight in the nation's capital. Similarly, *National R.R.* involved the maintenance and preservation of the national transportation system of the United States. *Midkiff* involved the problems resulting from the unique situation where a handful of people owned virtually all of the privately owned property in an entire state. Only rarely will the public use issue be seriously questioned in more traditional condemnation actions involving public highways, schools, or parks. In sharp contrast to cases involving those types of situations, however, if the Public Use Clause of the Fifth Amendment is to have any meaning, some meaningful judicial review

is required in cases such as this, where the government forcibly takes private property from one person to convey it to another more favored corporation.

The importance of granting the Petition in this case is demonstrated by the fact that the Minnesota Supreme Court was evenly divided on the fundamental constitutional issue of whether the taking was for a public use. Like this Court, the Minnesota Supreme Court has the discretion to accept or deny review. The Minnesota Supreme Court accepted review, heard oral arguments and divided evenly on whether or not the taking was constitutional. Clearly, at least three members of the Minnesota Supreme Court had serious reservations regarding whether or not the taking was for a public use, but the court as a whole was not able to agree upon the proper disposition of the case.

The various state courts are split on the proper application of *Berman* in redevelopment cases. There are a small number of state court cases which recognize that there *are* limits to the discretion afforded condemning authorities, and that *Berman* was not intended to grant almost *carte blanche* authority to condemning authorities. *See Wilmington Park Auth. v. Land in the City of Washington*, 521 A.2d 227 (Del. 1986); *Mayor v. C.N. Thomas*, 645 So. 2d 940 (Miss. 1994); *Southwestern Illinois Dev. Auth. v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002), *petition for cert. filed*; *Redevelopment Auth. of the City of Erie v. Owners or Parties in Interest*, 274 A.2d 244 (Pa. 1971); *Condemnation of 110 Washington Street*, 767 A.2d 1154 (Pa. 2001). This position appears to be gaining some national attention and renewed interest by the courts. *See* 2A *Nichols on Eminent Domain* § 7.08[1][2] (3d ed. 2002). Such decisions cannot, however, be reconciled with

the decision below nor with the majority of state court decisions on this subject.

This Court has long held that the "nature of a use, whether public or private, is ultimately a judicial question." *Rindge,* 262 U.S. at 705. Petitioners respectfully submit that the principles adopted in *Berman* have been applied too broadly, and that they have become a "rubber stamp" for a wide-range of takings that were never contemplated by this Court in 1954.

### B. Review by This Court Is Particularly Necessary Because the Deferential Standard Afforded Condemning Authorities Should Not Apply in Cases Such As This Where (1) The HRA Made No Findings of Blight Before Commencing Condemnation and (2) the Stated Rationale for the Taking Is Pretextual.

Additionally, petitioners respectfully submit that there must be some point at which the courts cannot blindly defer to a condemning authority's proclamation that it is acting for a public use.

The courts may justifiably be reluctant to interfere with municipal redevelopment decisions which are reasoned and well-supported. In this case, however, the HRA took the Walsers' property for the alleged purpose of eliminating blight, yet it never even conducted any studies or made any findings that the area was blighted or threatened with blight. Indeed, in the companion tax increment financing decision in *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391 (Minn. Ct. App. 2001) (App. at 26), the Minnesota Court of Appeals (in a decision affirmed without opinion by an equally divided Minnesota

Supreme Court) held that the HRA's claim of blight in the Interchange West District was a "blatant disregard for limits on municipal authority." Similarly, the Court of Appeals stated that "[e]xhibiting a particular municipal meanness, respondents completely ignored the statutory prerequisites for exercise of this financing tool." (App. at 50)

Unlike *Berman,* in which the condemning authority undertook exhaustive studies and found substantial blighting factors such as the lack of indoor plumbing, lack of electricity, and lack of central heating, the HRA in this case never studied the blight issue, never made a finding that the area was blighted or threatened with blight, and never even *mentioned* the word "blight" until Best Buy directed the HRA to begin preparing the resolution authorizing condemnation. (App. at 118) Cf. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (in takings context, municipality bears the burden of quantifying or explaining its findings, beyond mere conclusionary statements).

Also unlike *Berman*, where the decrepit conditions of the properties justified the condemnation, the trial court and the HRA's own experts in this case found that the properties in the Interchange West District were generally in good condition. The courts should not blindly adopt municipal "blight" decisions which have the sole purpose of forcibly divesting a person of his or her property and giving it to another private party, particularly where the municipality has not studied, documented, or found that the area was blighted in the first place.

Moreover, the courts should not simply defer to municipal declarations of blight in cases such as this where it appears that the taking was pretextual for all of

the reasons set forth above. The primary purpose for the taking in this case was to attract and to accommodate Best Buy's new corporate headquarters. The HRA's claim of blight was pretextual, as demonstrated by the Minnesota Court of Appeals in the tax increment financing case, and therefore greater judicial scrutiny is required if the Public Use Clause of the Fifth Amendment is to have any meaning.

Several courts have held that they should carefully review efforts to acquire property by condemnation if the taking appears to be pretextual. *See City of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. Ct. App. 1987) (the City's stated reasons for the condemnation were a "complete fiction"); *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) *(en banc)* (no judicial deference required where ostensible public use is demonstrably pretextual). In similar circumstances, this Court has disapproved of pretextual governmental actions. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (rejecting claimed municipal rationale for conveyance of property where "there is heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police-power objective.").

## CONCLUSION

This Court is the final protector of private property rights. In this case, the HRA took the property of one private business for the purpose of conveying it to a more favored corporation, on the pretense that it was eliminating blight which had never been found to exist. If the Fifth

Amendment's public use requirement has any meaning, the Petition for Writ of Certiorari should be granted.

August 2002.

Respectfully submitted,

BRADLEY J. GUNN
*Counsel of Record*
LEONARD, STREET AND DEINARD, P.A.
Suite 2300
150 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 335-1500

CHRISTOPHER J. DIETZEN
LARKIN, HOFFMAN, DALY LINDGREN, LTD.
Suite 1500
7900 Xerxes Avenue South
Bloomington, MN 55431
Telephone: (952) 835-3800

BRUCE D. MALKERSON
*Of Counsel*
HOWARD A. ROSTON
*Of Counsel*
MALKERSON GILLILAND MARTIN LLP
1750 Pillsbury Center
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 344-1111

*Attorneys for Petitioners*

STATE OF MINNESOTA

IN SUPREME COURT

C8-01-309

Court of Appeals

Gilbert, J.
Took no part, Lancaster, J.

The Housing and
Redevelopment Authority
in and for the City of Richfield,

Respondent,

vs.

Filed: April 18 , 2002
Office of Appellate Courts

Walser Auto Sales, Inc., et al.,
petitioners,

Appellants,

R. J. Walser, et al., petitioners,

Appellants.

OPINION

GILBERT, Justice.

In July, 2000, respondent Housing and Redevelopment Authority for the City of Richfield commenced a quick take condemnation pursuant to Minn. Stat. § 117.042 (2000) to acquire real property owned by appellants Walser Auto Sales, Inc., Motorwerks, Inc., R. J. Walser, Paul Walser, and Andrew Walser. Appellants objected to the condemnation petition and the district court held a trial. In January 2001, the court granted respondent's petition. This case presents the issue of whether an appeal challenging the public purpose of a quick take condemnation pursuant to

Minn. Stat. § 117.042 is moot based either on reciprocal vesting at the time the property was transferred to respondent or on subsequent changes to the property after judgment was entered by the district court on the public purpose challenge to respondent's use of eminent domain. We also granted review of the court of appeals decision affirming the district court.

In 1993, respondent and the City Council of the City of Richfield (City) passed resolutions approving a Redevelopment Plan for the Richfield Redevelopment Project Area (1993 Redevelopment Plan). This plan grouped the previous redevelopment projects and additional property into one comprehensive redevelopment plan that included approximately 90 percent of Richfield, but it did not include appellants' property. In May 1999, respondent recommended that the City adopt a resolution to modify the 1993 Redevelopment Plan to include the Interchange West Area, an area bounded by Penn Avenue on the west, 76th Street on the north, Knox Avenue on the east, and 78th Street on the south. This area included appellants' property. A public hearing was held on June 14, 1999 and the City passed a resolution authorizing the Modification of the 1993 Redevelopment Plan so that it would include the Interchange West Area.

Around August 1999, Best Buy Co., Inc. (Best Buy), identified the Interchange West Area as a possible site for a new corporate headquarters. On March 28, 2000, respondent and Best Buy entered into a contract for private development of the Interchange West Area. This contract required Best Buy to make diligent efforts to negotiate the purchase of the buildings located in the Interchange West Area. Despite Best Buy's efforts to do so, Best Buy was

unable to negotiate a deal to purchase appellants' property. As a result, sometime between April and July 2000, Best Buy requested that respondent acquire this property through the use of eminent domain.

On July 17, 2000, respondent passed a resolution authorizing the use of eminent domain to acquire property owned by appellants. Respondent then filed a petition in Hennepin County District Court seeking to acquire appellants' property pursuant to a "quick take" under Minn. Stat. § 117.042.[1] Appellants challenged the quick take and a trial was held. On January 19, 2001, the district court granted respondent's petition and entered judgment authorizing a quick take, subject to appellants' right to remain on the property pursuant to a lease until midnight on June 15, 2001. The court also ordered the transfer of title to respondent subject to it depositing the approved appraised value of the property with the court and filing the order with the appropriate recording agency.

On February 16, 2001, appellants filed their notice of appeal but did not move for a stay of the January 19, 2001 order or post a supersedeas bond. On March 9, 2001, appellants moved the district court for a stay to prevent respondents from transferring title to Best Buy. The court denied appellants' request for a stay, concluding that it had no jurisdiction to stay the transfer from respondent to

---

[1] Pursuant to Minn. Stat. § 117.042, a petitioner is allowed to obtain title and possession of all or part of an owner's property prior to filing of an award by court appointed commissioners on payment or deposit with the court of an amount equal to the petitioner's appraisal of value.

Best Buy because the transfer from appellants to respondent had already occurred. This order also provided that in the event the court of appeals were to conclude that the district court had jurisdiction, appellants would be required to post a supersedeas bond in the amount of $15 million. The court stayed the effect of its order for 48 hours, allowing appellants time to appeal to the court of appeals. Appellants did not appeal and respondent transferred title to the property to Best Buy on March 16, 2001.

On July 3, 2001, the court of appeals affirmed the district court, concluding that appellants' appeal was not moot and that the district court did not clearly err in granting respondent's condemnation petition. *Housing and Development Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 671 (Minn. App. 2001). Specifically, the court held that the appeal was not moot because property acquired through the use of eminent domain can be ordered returned in the absence of a proper showing of public purpose. *Id.* However, the court of appeals concluded that the district court's findings, including that the property was taken for a public purpose, were not clearly erroneous. *Id.* Since this holding, construction on the property has continued to move forward. Therefore, we allowed the parties to submit a supplemental record on the mootness issue related to the events that have occurred since the district court's order. In reviewing this supplemental record, we consider only those documents containing undisputed facts and take judicial notice of the fact that the judgment was recorded to transfer title, all of appellants' buildings have been demolished, and some buildings have been constructed on portions of the property.

We must first address the mootness issue for when an event occurs pending appeal that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot. *See In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). An issue is not moot if a party could be afforded effectual relief. *See In re Schmidt,* 443 N.W.2d 824, 826 (Minn. 1989). Respondent argues that the appeal in this case is moot for two reasons. First, respondent argues that appellants' public purpose challenge became moot upon the transfer of title to the property to respondent because the rights of both parties became reciprocally vested at that time. Second, respondent argues that even if the parties' rights did not reciprocally vest upon the transfer of title, the events that have occurred subsequent to the transfer of title have rendered appellants' public purpose challenge moot.

In *State ex rel McFarland v. Erskine,* we held:

> In every form of procedure for appropriating land for the public use, there must be a point where the right of the condemner to abandon the proceeding is lost and the right of the landowner to compensation becomes vested. As a general rule the condemner cannot deprive the landowner of a vested right to compensation by abandoning the proceeding. The theory upon which [this] rule is based is that, upon final termination of the proceeding, the right of the condemner to take and hold the land and the right of the landowner to the money are correlative and coincident and vest simultaneously in the respective parties.

165 Minn. 303, 307, 206 N.W. 447, 449 (1925). We have followed this rule of reciprocal vesting in subsequent cases. *See County of Hennepin v. Mikulay,* 292 Minn. 200,

212-13, 194 N.W.2d 259, 266-67 (1972); *Independent School Dist. No. 273 v. Gross,* 291 Minn. 158, 167-68, 190 N.W.2d 651, 657-58 (1971); *State, by Lord v. Myhra G.M.C. Truck & Equip. Co.,* 254 Minn. 17, 20, 93 N.W.2d 204, 206 (1958). However, the concept of reciprocal vesting only arises "upon final termination of the proceeding" when the right of the condemning authority to take and hold the land gives rise to the right of the landowner to compensation for the taking. *Erskine,* 165 Minn. at 307, 206 N.W. at 449. Here, there was not a final termination of the proceeding when the appeal was taken because the crux of the appeal, whether respondent ever had the right to take and hold appellants' property, had not been finally resolved.

The dispute over respondent's right to take appellants' property makes this case fundamentally different from the line of cases relied upon by respondent. Specifically, in those cases there was no issue on appeal as to the condemning authority's right to take the land at issue; rather, the reciprocal vesting doctrine was invoked to enforce an owner's right to payment when the condemning authority, without the consent of the landowner, sought to abandon, dismiss, or discontinue the condemnation proceedings. *See City of Maplewood v. Kavanagh,* 333 N.W.2d 857 (Minn. 1983); *Mikulay,* 292 Minn. 200, 194 N.W.2d 259; *Gross,* 291 Minn. 158, 190 N.W.2d 651; *Myhra,* 254 Minn. 17, 93 N.W.2d 204; *Erskine,* 165 Minn. 303, 206 N.W. 447. In each of these cases, the party from whom the property was taken either voluntarily surrendered possession or did not challenge the condemning authority's right to exercise its power of eminent domain and the condemning authority desired to terminate the proceedings. The reciprocal vesting doctrine was adopted in part to protect landowners

from being harassed and forced to expend more time and money defending against multiple and successive condemnation actions on the same property. *See Kavanagh,* 333 N.W.2d at 861. In this case, there is no doubt that if respondent had a right to take appellants' property, appellants have a right to compensation. However, when a condemning authority's right to take a landowner's property has continually been challenged by the landowner and there has not been a final termination of the proceedings, the doctrine of reciprocal vesting cannot be invoked to dismiss an appeal.

Respondent argues for a bright line rule that the parties' rights in this case reciprocally vested the moment title was transferred, thereby rendering appellants' public purpose challenge moot. Respondent relies primarily on our decision in *Mikulay* to support its argument. However, the only issue we found moot in *Mikulay* was the ejectment case brought by the landowner, which was moot "by virtue of the surrender of possession by the landowners to the county and the county's acceptance of such possession" and the fact that "there [was] nothing for [this court] to decide as far as that appeal [was] concerned." *Mikulay,* 292 Minn. at 205, 194 N.W.2d at 262. As for the public purpose challenge, we refused to "close the door" to a landowner's raising the question of whether the taking was for a public purpose and instead considered the appropriateness of summary judgment in light of the facts in the case. *Id.* at 210, 194 N.W.2d at 265. This consideration indicates that we reviewed the Mikulays' public purpose challenge, even though title had transferred, the county had already taken possession of the land, and the Mikulays had accepted the amount deposited with the court prior to the time the appeal was heard.

As the court of appeals recognized, Minn. Stat. § 117.215 (2000), which provides that a condemning authority takes a fee simple interest without any right of reversion under any circumstances, applies only if property is taken for a public purpose. *Walser,* 630 N.W.2d at 670. The existence of a public purpose is the underlying issue in this case. Despite respondent's suggestion to the contrary, we have never held that a public purpose challenge becomes moot upon the transfer of title and possession. In fact, in *City of Duluth v. State,* we specifically addressed the public purpose issue although title had passed and money had been deposited. 390 N.W.2d 757, 762-64 (Minn. 1986). While it is true that the mootness issue was not directly raised in *City of Duluth,* if we adhered to the bright line rule urged by respondent, we would not have needed to address the public purpose issue on appeal. *See also Minnegasco,* 565 N.W.2d at 710 (noting that when an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot). As the court of appeals noted, if transfer of title were held to moot any challenge to the public purpose, all condemning authorities could insulate the public purpose requirement from judicial review by utilizing the quick-take procedures. This is a rigid rule that does not always satisfy our test for mootness.

We have recognized that equitable relief may remain available even after the condemning authority has acquired title to the property. *See County of Blue Earth v. Stauffenberg,* 264 N.W.2d 647, 649-50 (Minn. 1978) (stating that although a taking may be completed by the time the necessity of the governmental taking is finally reviewed by this court, the governmental body that took the

property can be compelled to return it to its previous owner); *see also In re Rapp*, 621 N.W.2d 781, 784 (Minn. App. 2001) (holding that property owner still has relief in the form of the return of his property though condemnation was complete and a highway was constructed across the property). Adopting respondent's bright line rule would result in effectively holding that, in all public purpose challenges, even if there was an unconstitutional taking, the transfer of title immediately renders any effective relief impossible at any point thereafter. In this case, such a holding would mean that the appeal became moot not on January 19, 2001 (the date of the judgment), but immediately after respondent recorded the judgment to transfer the title to respondent on February 13, 2001. However, there is nothing in the record to indicate that effective relief, including the return of all or a portion of appellants' property, would not have been possible on February 14, 2001 or thereafter. Therefore, we hold that appellants' appeal did not become moot upon the recording of the judgment to transfer title to the property to respondent.

Respondent further argues that the appeal is moot because physical changes to the Interchange West Area have made it impossible to return appellants' property in the condition it existed prior to respondent's acquisition of title. This appeal is not moot if appellants could be afforded effective relief. *See Schmidt*, 443 N.W.2d at 826. The subsequent events brought on solely by respondent while facing a public purpose challenge on appeal may be considered when deciding what relief is available but they are not dispositive of the appeal. Respondent concedes that there is some doubt about the feasibility of reconstruction or whether some of the property in dispute can be deeded back. This uncertainty, coupled with the factual

disputes between the parties relating to the present conditions and feasibility of reconstruction on this record makes it unclear what portions, if any, of this property could be transferred back without causing an absurd result. Since respondent may be compelled to return all or part of appellants' property if it took the property in an unconstitutional manner, *see Stauffenberg,* 264 N.W.2d at 649-50, we hold that appellants' public purpose challenge is not moot. We hold this even though the appropriate remedy could be something other than the return of all of the property. The court of appeals' decision that the appeal is not moot is affirmed on the grounds stated herein.[2]

As to the remaining issues for which we granted review, the court is evenly divided. Therefore, the decision of the court of appeals stands.

Affirmed as to mootness issue.

LANCASTER, J., took no part in the consideration or decision of this case.

---

[2] To hold otherwise would actually insulate and arguably reward condemning authorities who fail to meet the public purpose requirements, but begin improvements prior to the conclusion of the very litigation challenging this authority.

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**C8-01-309**

The Housing and Redevelopment Authority
in and for the City of Richfield,
petitioner,
Respondent,

vs.

Walser Auto Sales, Inc., et al.,
Appellants.

**Filed July 3, 2001**
**Affirmed**
**Harten, Judge**

Hennepin County District Court
File No. CD2604

Bradley J. Gunn, Carolyn Veehoff Wolski, Leonard Street & Deinard, 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402; and

Bruce D. Malkerson, Malkerson Gilliland & Martin, L.L.P., 901 Marquette Avenue, Suite 1500, Minneapolis, MN 55402-3205 (for appellants)

John M. LeFevre, Jr., Corrine H. Thomson, Joe Yao-Chou Yang, Kennedy & Graven, Chartered, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Toussaint, Chief Judge, Randall, Judge, and Harten, Judge.

## OPINION

**HARTEN**, Judge

The district court granted a quick-take condemnation pursuant to Minn. Stat. § 117.042 (2000) to respondent Housing and Redevelopment Authority for the City of Richfield. Appellants Walser Auto Sales, Inc., Motorwerks, Inc., R.J. Walser, Paul Walser, and Andrew Walser contend that the taking was not authorized by law and was not supported by findings of public purpose and necessity. Respondent alleges that the appeal is moot because it has acquired title to the property. Because we conclude that the appeal is not moot, we address the merits and affirm.

## FACTS

Respondent Housing and Redevelopment Authority for the City of Richfield (the HRA) commenced this condemnation action to acquire real property belonging to appellants Walser Auto Sales, Inc., Motorwerks, Inc., R.J. Walser, Paul Walser, and Andrew Walser (Walser). Appellants objected to the condemnation petition. The district court held an evidentiary hearing on respondent's motion for condemnation.

By order dated January 19, 2001, the district court concluded:

> (1) That the HRA's petition is granted and the HRA is authorized by law to acquire the real estate described in its petition herein, as amended, under the procedures specified in Minn. Stat. Chapter 117 (1998) and other law.
>
> (2) That the HRA has shown that the taking is for a public use and purpose, is necessary

and convenient in furtherance of a redevelopment project within the City of Richfield, and that the acquisition is required prior to the filing of an award of commissioners.

(3) That the HRA has complied with all the legal requirements for obtaining title and possession pursuant to Minn. Stat. § 117.042 (1998) subject to Walsers' right to remain on the property pursuant to a lease (approved by the Court if the parties cannot agree or other arrangements agreed to by the parties) until 12:00 midnight on June 15, 2001.

Respondent subsequently obtained title to the property by depositing the appraised value of the property with the district court and by recording the required instruments. On February 16, 2001, appellants filed their notice of appeal. Appellants did not seek a stay or post a supersedeas bond to prevent respondent from obtaining title. On March 16, 2001, respondent conveyed title to Best Buy Co., Inc.

While this appeal was pending, respondent moved to dismiss the appeal as moot and appellants moved to expedite the appeal. By special term order, this court denied both motions. The order stated that the opinion addressing the merits of the appeal would also discuss the parties' motions.[1]

---

[1] Appellants' motion to expedite this appeal was denied for the following reasons. Appellants did not seek a stay or a supersedeas bond. The day of the appeal, respondent acquired title to the property under Minn. Stat. § 117.042. Later, appellants formally moved the district court to stay enforcement of the January 19, 2001, order until June 15,

(Continued on following page)

## ISSUES

1. Did the district court err in granting the condemnation petition?

a. Was the taking of appellants' property authorized by law?

b. Was the taking of appellants' property for a public use and purpose?

c. Was the taking of appellants' property necessary?

2. Is this appeal moot?

---

2001, to preclude transfer of the property to third parties until that time, and to condition a stay on appellants' posting of a supersedeas bond. The district court (a) ruled that, because title had already transferred to respondent, it lacked jurisdiction to grant a stay; (b) noted respondent's claim that a stay could cause millions of dollars in damages; (c) stated that if the court of appeals concluded the district court had jurisdiction to grant a stay, the appropriate bond amount was $15 million; and (d) stayed its order for 48 hours or until further order of the court of appeals. Instead of seeking relief from the district court's order, appellants, two months later, moved to expedite the appeal, seeking an opinion by "early June [2001]." Absent agreement of the parties, an early-June opinion would not have been final before appellants had to vacate the property on June 15, 2001. Minn. R. Civ. App. P. 136.02. Appeals may be expedited for good cause. Minn. App. Spec. R. Pract. 1. Here, however, appellants have not specifically identified the good cause supporting their request to expedite and any need to expedite could have been avoided if appellants had posted a supersedeas bond when they appealed. Alternatively, appellants could have used the 48-hour window in the district court's order to challenge that order. Appellants did neither. Their motion to expedite is functionally an attempt to circumvent the posting of a supersedeas bond they claim they cannot post but the terms of which they have not challenged. We decline to expedite the appeal under these circumstances.

## ANALYSIS

### 1. Condemnation Petition

"Our scope of review in a condemnation case is very narrow." *County of Dakota (C.P.46-06) v. City of Lakeville,* 559 N.W.2d 716, 719 (Minn. App. 1997) (citing *City of Duluth v. State,* 390 N.W.2d 757, 763 (Minn. 1986)).

> Great weight must be given to the determination of the condemning authority, and the scope of review is narrowly limited. If it appears that the record contains some evidence, however informal, that the taking serves a public purpose, there is nothing left for the courts to pass upon. * * * The court is precluded from substituting its own judgment for that of the [public body] as to what may be necessary and proper to carry out the purpose of the plan.

*In re Minneapolis Cmty. Dev. Agency (MCDA) v. Opus N.W., L.L.C.,* 582 N.W.2d 596, 598 (Minn. App. 1998) (quoting *City of Duluth,* 390 N.W.2d at 763 (quoting *Housing & Redev. Auth. v. Minneapolis Metro. Co.,* 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960))), *review denied* (Minn. Oct. 29, 1998).

> Public purpose and necessity are questions of fact, and the district court's decisions on these matters will not be reversed on appeal unless clearly erroneous.

*MCDA,* 582 N.W.2d at 599 (citing *State by Humphrey v. Byers,* 545 N.W.2d 669, 672 (Minn. App. 1996)).

**a. Taking Authorized by Law**

Appellants contend that the taking of their property was not authorized by law because the HRA lacked jurisdiction or authority to bring this condemnation action. However, pursuant to Minn. Stat. § 469.012, subd. 1(6) (2000), the HRA may

> acquire real property which it may deem necessary for its purposes, after the adoption by it of a resolution declaring that the acquisition of the real property is necessary to eliminate one or more of the conditions found to exist in the resolution adopted pursuant to section 469.003 * * * .

And in the memorandum of law accompanying its order granting the condemnation petition, the district court stated:

> Minn. Stat. § 469.003 states that the HRA may not transact any business or exercise any powers until it has "by resolution, [found] that in the city (1) substandard, slum, or blighted areas exist which cannot be redeveloped without government assistance." There is no dispute that the HRA was created in 1974 in accordance with Minn. Stat. § 469.003 by adoption of Resolution No. 5238. Thus, when the HRA adopted Resolution No. 771, which included a finding that it was necessary to acquire the Subject Property to eliminate blight and structurally substandard buildings, it authorized a taking whose purpose was to eliminate the conditions found to exist in Resolution No. 5238. Accordingly, pursuant to the express language of Minn. Stat. § 469.012, subd. 1(6), the Petition should be granted because the HRA was duly created pursuant to Minn. Stat. § 469.003 by virtue of Resolution No. 5238 and

> the HRA adopted a resolution authorizing acquisition of the Subject Property in order to eliminate conditions that were specified in Resolution No. 5238.

Appellants argue that the taking violated the Minnesota Environmental Policy Act (MEPA), Minn. Stat. Chapter 116D. They contend that the City of Richfield and the HRA "wrongfully took numerous actions, including the HRA's presentation of its petition for condemnation to the Court, before the environmental review process had been completed." Appellants rely on Subparts 1 and 2 of Minnesota Rule 4410.3100, which read as follows:

> Subpart 1. **Prohibitions.** If an EAW or EIS is required for a governmental action under parts 4410.0200 to 4410.7500, or if a petition for an EAW is filed under part 4410.1100, *a project may not be started* and a final governmental decision may not be made to grant a permit, *approve a project, or begin a project, until:*
>
> A. a petition for an EAW is dismissed;
>
> B. a negative declaration on the need for an EIS is issued;
>
> C. an EIS is determined adequate; or
>
> D. a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8.
>
> Subp. 2. **Public projects, prohibitions.** If *a project* subject to review under parts 4410.0200 to 4410.7500 is proposed to be carried out or sponsored by a governmental unit, *the governmental unit shall not take any action with respect to the project, including the acquisition of property, if the action will prejudice the ultimate decision on the project*, until a petition has been

> dismissed, a negative declaration has been issued, or until the final EIS has been determined adequate by the RGU or the EQB, unless the project is an emergency under subpart 9 or a variance is granted under subparts 4 to 8. An action prejudices the ultimate decision on a project if it tends to determine subsequent development or to limit alternatives or mitigative measures.

(Emphasis added.)

Respondent correctly points out that appellants have not established any prejudice. Appellants may not establish prejudice with mere allegations; they must present "evidence establishing that the agency's review was compromised." *In re Univ. of Minnesota,* 566 N.W.2d 98, 106 (Minn. App. 1997). The district court found no such prejudicial evidence. Instead, it stated:

> Now that the final EIS has been determined adequate, there is no reason that the condemnation action should not proceed and the HRA acquire the land. This Court finds Walser's MEPA argument is moot. The final EIS has been determined adequate; there is no reason the property acquisition may not proceed.

Finally, appellants contend that the HRA failed to comply with the applicable relocation regulations. The district court, however, in finding of fact No. 45, found

> [t]hat the relocation services and assistance that the City has provided to the Walsers consists of a letter dated September 13, 2000, from the City's relocation consultant to Walser Buick Isuzu. The Walsers misinterpreted the letter and ignored it.

The evidence supports this finding; the district court properly rejected appellants' claims relating to relocation assistance.

We conclude that the district court lawfully approved the taking of appellants' property.

**b. Public Purpose**

Appellants argue that the evidence does not support the district court's finding that the taking serves a public purpose.

> [I]n light of the deferential scope of review, this court has construed the words "public use" broadly. Historically, the court has used the words "public use" interchangeably with the words "public purpose," thus implying that even though a public entity, using its eminent domain powers, turns over parcels to a private entity for use by that private entity, the condemnation will, nevertheless, be constitutional if a public purpose is furthered by such a transfer of land.

*City of Duluth v. State,* 390 N.W.2d 757, 763 (Minn. 1986).

Minn. Stat. § 469.012, subd. 1(6), authorizes the HRA to condemn real property if it "is necessary to carry out a redevelopment project." Minn. Stat. § 469.002, subd. 14 (2000), defines a "redevelopment project" as "any work or undertaking" to "acquire blighted areas and other real property for the purpose of removing, preventing, or reducing blight, blighting factors, or the causes of blight."

In its memorandum of law, the district court stated:

> In Resolution No. 771 authorizing the HRA's use of eminent domain to acquire the Subject

> Property, the HRA found that it was necessary to acquire the Subject Property in order to "deal with properties that are structurally substandard and to eliminate and prevent the development or spread of conditions of blight found to exist by the City and HRA." In addition, the Petition alleges that it is necessary and for a public purpose to acquire the Subject Property to implement the Redevelopment Plan, as modified by the Modification and consistent with the findings in HRA Resolution No. 771. Thus, the HRA, by Resolution No. 771 and the Petition, has made a prima facie showing that the acquisition of the Subject Property is necessary for a public purpose.

Appellants, however, contend that the property in question is not a blighted area. Minn. Stat. § 469.002, subd. 11 (2000), defines "blighted area" as

> any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

Bruce Palmborg, the director of community development for the City of Richfield, testified about the conditions of blight in the project area. Palmborg testified that incompatible land uses, such as the proximity of auto dealerships to residential areas, constituted blight. Palmborg testified that neighborhood residents repeatedly complained about traffic safety concerns caused by the demonstration driving of cars in the neighborhood and by customers short-cutting through the neighborhood to get

to the car dealerships. Palmborg testified that residents also complained of excessive noise, created by APA systems used to contact people out on the car lots, which spilled over into the adjoining neighborhood.

Tom Goodoien, a consultant with over 35 years of experience in conducting building analyses for establishment of redevelopment projects and tax increment financing districts, prepared a report on the commercial properties in the project area. Goodoien concluded:

> The building conditions were analyzed to ascertain qualifiers pertinent to Minnesota Statutes * * * . The commercial spaces are not necessarily obsolete for their present or continued use but are functionally obsolete for commercial spaces serving the public patron and lack certain life safety factors, elements of the Americans with Disabilities Act (ADA) and obsolete mechanical systems essential for quality tenant space.
>
> Also the proposed project area is environmentally "blighted" with many properties exposed to hazardous traffic patterns, merging and "jockeying" vehicles on narrow streets, the existence of diverter barriers and lacking adequate parking facilities (resulting in cars parked on sidewalks) all impeding the smooth flow of traffic in an area lacking adequate infrastructure. Poor interior traffic patterns are addressed inappropriately by using diverter crash walls in main arterial streets, which disrupts and impedes the flow of traffic and prohibits normal snow removal. Many commercial uses are too intense with trucks unloading from the street due to inadequate off street parking causing hazardous

> conditions to pedestrians, and insufficient space to maneuver trucks.

It is apparent that these conditions constitute obsolescence, overcrowding, and faulty arrangement or design, that are detrimental to the safety and welfare of the community within the definition of blight under Minn. Stat. § 469.002, subd. 11. Moreover, the district court found that Resolution No. 771, the 1993 Redevelopment Plan, the 1999 Modification, all of the staff reports relating to the Modification and Redevelopment Plan, and the "experience and knowledge of staff, council[,] and board members supported the findings that conditions of blight existed in the Project area." Given the holding in *Housing & Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 7, 104 N.W.2d 864, 869 (1960), that "the acquisition and clearing of blighted areas serve a public purpose," and the HRA's statutory authority to condemn the property to eliminate and prevent blight, we conclude that the district court did not clearly err in finding that the taking was for a public purpose.

**c. Necessity**

Appellants argue that the evidence does not support the district court's finding that the taking was necessary.

> *Absolute necessity* is not required for a finding of public purpose, rather it is enough to find that the proposed taking is *reasonably necessary* or *convenient* for the furtherance of a proper purpose.

*MCDA*, 582 N.W.2d at 600 (quotations omitted). Appellants contend that "there is no evidence that other alternatives were even explored." But, "[a] party challenging the

necessity of the condemnation of a parcel will not succeed by merely suggesting alternatives to the government's plan." *Id.* (citing *City of Duluth,* 390 N.W.2d at 766).

Appellants argue that the project was too speculative because permits and approvals still need to be obtained and because the agreement contained contingencies that allowed Best Buy to abandon the project. Appellants rely on the statement in *Regents of Univ. of Minnesota v. Chicago & N.W. Transp. Co.,* that "[s]peculative purposes will not support the assertion of necessity." *Regents of Univ. of Minnesota v. Chicago & N.W. Transp. Co.,* 552 N.W.2d 578, 580 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Nov. 20, 1996). But appellants' reliance is misplaced. In *Regents,* we held that because the university had "not yet approved a single project for the property," it could not acquire the property "for speculative future use (stockpiling) by condemnation." *Id.* Here, the HRA has identified the Best Buy headquarters as the project for which the property is necessary. Contingencies, such as the permits and approvals remaining for this project, are normal contingencies for a major redevelopment project. *See MCDA,* 582 N.W.2d at 597 ("Public purpose and necessity cannot be thwarted * * * by alleging that the purpose for condemning the property is too speculative if in fact the project is officially supported by the governmental entity and ordinary agreements are in place to realize the project."). We conclude that the district court did not clearly err in finding that the condemnation was "necessary and convenient in furtherance of a redevelopment project."

**2. Mootness**

Respondent argues that this appeal is moot because it acquired title to a fee simple interest in the property and Minn. Stat. § 117.215 (2000) provides that a condemning authority takes a fee simple interest in property for public use "without any right of reversion under any circumstances." But Minn. Stat. § 117.215 applies *if* property is taken for a public use. Here, the *existence* of a public use and the necessity of the taking are at issue and title was acquired through quick-take proceedings. If transfer of title were held to moot any challenge to the public use and the necessity, condemning authorities could insulate those elements from judicial review in quick-take acquisitions. Such a holding would run counter to *County of Blue Earth v. Stauffenberg*, 264 N.W.2d 647, 649-50 (Minn. 1978) (allowing interlocutory appeal of a district court order finding the existence of public necessity).

*Stauffenberg* also vitiates respondent's argument that Minn. Stat. § 117.215 precludes a court from directing that title be returned to a condemnee.

> Although the taking may be completed when the necessity issue is finally reviewed by [an appellate court], the governmental body which took the disputed property can be compelled to return it to its previous owner.

*Id.* at 649-50. *See also In re Rapp*, 621 N.W.2d 781, 784 (Minn. App. 2001) ("[a]lthough Rapp's land has been condemned and a highway built across it, Rapp still has

relief in the form of the return of the property" (citing *Stauffenberg*, 264 N.W. 2d at 650)).[2]

Respondent also argues that the appeal is moot because appellants' failure to post a supersedeas bond allowed respondent to acquire title to the property. For purposes of the motion to dismiss, however, the question is whether title can be transferred back to appellants. Therefore, *Stauffenberg* and *Rapp* address this aspect of respondent's argument and indicate that this appeal is not moot.

## DECISION

The district court did not clearly err in granting the condemnation petition; its findings that the taking of appellants' property was authorized by law, was for a public purpose, and was necessary, are supported by the evidence and are not clearly erroneous. The appeal is not moot because property can be ordered returned in the absence of a proper showing of public use.

**Affirmed.**

---

[2] Respondent also alleges *Rapp* is distinguishable because the lack of briefing of mootness may have resulted in this court not making a fully-considered decision. We decline to hold that *Rapp* was wrongly decided because it admitted the existence of a remedy which the supreme court had previously indicated was available.

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**C4-01-694**

Walser Auto Sales, Inc., et al.,
Appellants,

vs.

City of Richfield, et al.,
Respondents.

**Filed November 13, 2001**
**Reversed and remanded**
**Amundson, Judge**

Hennepin County District Court
File No. AP0011927

Bradley J. Gunn, Leonard, Street & Deinard, 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402; and

Bruce D. Malkerson, Malkerson Gilliland & Martin, LLP, 901 Marquette Avenue, Suite 1500, Minneapolis, MN 55402 (for appellants)

John M. LeFevre, Jr., Kennedy & Graven, Chartered, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, MN 55402 (for respondents)

Susan L. Naughton, League of Minnesota Cities, Minnesota NAHRO, 145 University Avenue West, St. Paul, MN 55103-2044 (for amicus curiae)

Considered and decided by Toussaint, Chief Judge, Klaphake, Judge, and Amundson, Judge.

## OPINION

**AMUNDSON**, Judge

Appellants challenge the use of tax-increment financing to fund a redevelopment project. After a court trial, the district court dismissed appellants' complaint and awarded respondents attorney fees. On appeal, appellants allege that the project is defective because (a) the primary beneficiary of the project is a private interest; (b) respondents failed to make adequate efforts to inspect the properties deemed substandard; (c) the record does not support the determinations that the properties in the area were structurally substandard; and (d) the alleged structurally substandard buildings were not reasonably distributed throughout the tax-increment-financing district. Appellants also allege that they have standing to challenge the use of tax-increment financing and that the district court abused its discretion in awarding respondents attorney fees.

## FACTS

This case involves the use of tax-increment financing (TIF) for the development of a new corporate headquarters for Best Buy Co., Inc. (Best Buy). Appellants Walser Auto Sales, Inc.; Robert J. Walser; Motorworks, Inc.; Paul Walser; and Andrew Walser (collectively "Walser") were the owners or operators of two automobile dealerships on an approximately seven-acre parcel of land located in the City of Richfield, in the northeast quadrant of I-494 and Penn Avenue. The Richfield Housing and Redevelopment Authority (HRA) is a housing and redevelopment authority created in 1974 pursuant to chapter 469 of the Minnesota Statutes.

In June 1993, the city and the HRA (collectively "respondents") consolidated previous redevelopment projects and prospective development property under one plan: the Redevelopment Plan for the Richfield Redevelopment Project Area (the 1993 plan). This plan encompassed approximately 90% of the city, but did not include the land at issue here. As the result of a proposal by CSM Properties (CSM) that called for the development of a hotel, office buildings, townhomes, an apartment building, a restaurant, and an upscale auto dealership to be owned by Walser, respondents, in 1998, sought to expand the 1993 plan to include the area in dispute, known as the Interchange West Area. Because the CSM proposal called for the use of TIF, the city was required to establish an appropriate TIF district. The city then established the Interchange West and Lyndale Gateway Tax-Increment-Financing District (the TIF district), which included 74 residential properties and 16 commercial properties, including the Walser property, in the area bounded by I-494 to the south, 76th Street to the north, Penn Avenue to the west, and Knox Avenue to the east.

To qualify the property as a redevelopment TIF district, respondents needed to show that more than 50% of the buildings within the district were "structurally substandard." Minn. Stat. § 469.174, subd. 10 (a) (1) (2000). The city retained the architectural firm YHR Partners (YHR) to investigate the condition of the residential properties and Tom Goodoien, an inspector familiar with TIF evaluations, to investigate the commercial properties.

At the beginning of the investigation, YHR noted that the properties in the district generally appeared to be in good condition and could not "by any means, be classified

as 'run down.'" Because "the desired results" may not have been produced by using only standard condition-assessment methodology, YHR recommended an "alternative approach." Under the alternative approach, buildings were assessed using a "life cycle" or depreciation analysis that presumed a limited life span of major building components and estimated the cost of replacing items at the end of their projected life span as compared with the cost of replacing the entire building. YHR had never used the "life cycle" approach before.

After the city agreed to this approach, YHR began assessing the subject properties. The HRA sent out a batch of letters to the property owners requesting permission to enter the properties to inspect them. After explaining that establishment of a TIF district is a prerequisite to "redevelopment of the area," the letters stated:

> One of the steps in the process of creating a [TIF district] is the evaluation of the physical condition of the buildings in the area. YHR * * * will be looking at the houses and apartments in the area. The condition of the buildings will be determined by outside observation together with a review of public records such as building permits. However it is beneficial if the interior of a building can be looked at as well. We are required to make an attempt to enter each building. However, interior evaluations are voluntary.

The letters went on to note that the evaluations would only be used to help determine the type of TIF district that would be created. In closing, the letters noted that follow-up letters would be sent out in a week and that if no response was received within a week of the second letter, the city would "assume" the property owner was "not

interested." The follow-up letter was a simple reminder that again noted the voluntary nature of the interior evaluations. Although respondents received only 15 responses, neither YHR, the city, nor the HRA made any phone calls to the property owners. In every other TIF project on which YHR had worked, numerous follow-up phone calls had been made to attempt to obtain permission to inspect the interior of each property.

Because of the low number of responses received, YHR inspected the interiors of only 20% of the buildings it evaluated. The rest were evaluated by viewing them without setting foot on the property (i.e., from the street) and by reviewing other sources, including county assessor tax information, building-permit information, property-transfer records, and maps. The inspectors did not review fire or police inspections or any other on-site reports for the properties.

Ultimately, YHR found 91% of the buildings to be structurally substandard. This finding was substantially based on the fact that the buildings were not insulated in conformance with the standards for new construction in the current Minnesota Energy Code (the energy code). Most of the determinations regarding these energy code violations were made without interior inspections. In order to determine whether the buildings satisfied current energy standards, YHR extrapolated from the information they gathered in the 15 residential buildings that they were actually able to inspect. In contrast, YHR failed to similarly extrapolate on data tending to raise the estimated value of the homes. For example, all 15 interior-inspected homes were found to have upgraded cabinetry. Yet YHR assumed that none of the remaining homes had similarly upgraded cabinetry. Neither YHR, the city, nor

the HRA sent copies of their reports to homeowners so that any errors might be corrected.

Based on the YHR report (and Goodoien's report incorporated therein), the HRA recommended approval of the TIF Plan. In June 1999, the city adopted the findings in the YHR Report and, in reliance thereon, determined that more than 50% of the buildings in the proposed TIF district were "structurally substandard." The city then approved the TIF district. At the same time, the city adopted a Modification to the Redevelopment Plan for the Richfield Redevelopment Project Area (the 1999 plan modification), which added the Interchange West Area and the CSM-proposed structures to the 1993 plan, and adopted the related tax-increment-financing plan (the TIF plan) to serve as a funding source for implementing the 1999 plan modification.

Shortly after the city modified the 1993 plan for CSM, CSM abandoned its proposal. Consequently, the HRA began negotiations with Best Buy for the construction of a new corporate headquarters in the TIF district. Eventually Best Buy and the city reached an agreement to build a 1.5 million-square-foot office facility in the Interchange West Area. In August 2000, the HRA began condemnation proceedings against Walser that resulted in the district court granting a quick-take condemnation over Walser's objection. Walser appealed, and we recently affirmed. *Housing & Redev. Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. App. 2001), *review granted* (Minn. Sept. 25, 2001) (*Walser I*).

Contemporaneous with the initiation of the condemnation proceedings, Walser simultaneously filed an action challenging the use of tax-increment financing for the

development. The complaint stated five causes of action. In count I, Walser challenged the collection of tax increment by challenging the inclusion and retention of parcels of property within the TIF district. Specifically, Walser challenged the city's determination that buildings in the TIF district were "structurally substandard," alleging that: (a) the city and HRA failed to use their best efforts to obtain permission for interior inspections; (b) the methodology employed to arrive at the determination was flawed and result-oriented; and (c) that the structurally substandard buildings were not reasonably distributed throughout the TIF district. In count II, Walser challenged the collection of tax increment by challenging the city's findings that, "but for" the creation of the TIF district, the subject properties would not be developed. In count III, Walser challenged the expenditure of the revenue for the project as not being authorized by Minn. Stat. § 469.176 (2000). In count IV, Walser challenged the expenditure of public funds for a predominantly private purpose. In count V, Walser challenged the proposal as unlawfully speculative and conditional under the terms of the agreement, and because the environmental-review process had not been completed.

The city and the HRA moved for summary judgment with respect to each of Walser's claims, arguing that Counts I and II were not authorized under Minn. Stat. § 469.1771, subd. 1 (1990), and that there was no improper conduct in the creation of the TIF district or the proposed expenditure of TIF funds. Reserving its ruling on this motion, the court held a bench trial on December 26 and 27, 2000.

On January 19, 2001, the court dismissed the Walser complaint in its entirety as a matter of law, finding that

there was a reasonable factual basis in the record to sustain the city's findings in support of the TIF district and the establishment of the TIF plan, and that Walser did not, as a taxpayer, have standing to maintain a cause of action for counts I and II. Shortly thereafter, the court granted the city's and HRA's motion for attorney fees and costs as the prevailing parties pursuant to Minn. Stat. § 469.1771, subd. 1(a) (2000). This appeal followed.

## ISSUES

I. Do citizen taxpayers have standing to challenge the inclusion of property within a tax-increment-financing district for districts formed before May 15, 2000?

II. Does a citizen-taxpayer have standing to challenge the retention of property within a tax-increment-financing district?

III. Is a district court's conclusion that a particular expenditure was for "a public purpose" sufficient to satisfy requirement that all public expenditures be primarily for a public purpose?

IV. Was a redevelopment-tax-increment-financing district properly established in this case?

## ANALYSIS

### I.

Counts I and II of the complaint allege that property was improperly included or retained in the TIF district as modified. The Minnesota statutes in effect at the time the TIF district was created prohibited the improper inclusion or retention of property within a TIF district. Minn. Stat.

§ 469.1771, subd. 2 (1990). Nevertheless, the district court determined that Minn. Stat. § 469.1771 (1990) did not contemplate a private cause of action for violations of subdivision 2 of that statute. Statutory construction is a question of law, which we review de novo. *Brookfield Trade Ctr., Inc v. Cty. of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

Minn. Stat. § 469.1771, subd. 1 (a) (1990) provided that owners

> of taxable property located in the city * * * in which the tax increment financing district is located may bring suit *for equitable relief or for damages, as provided in subdivisions 3 and 4*, arising out of a failure of a municipality or authority to comply with the provisions of sections 469.174 to 469.179, or related provisions of this chapter.

(Emphasis added.) When a statute, read according to ordinary rules of grammar, is unambiguous, that plain language is followed. *Boatwright v. Budak*, 625 N.W.2d 483, 485-86 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Ambiguity only arises when the statutory language is subject to more than one reasonable interpretation. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

The phrase "as provided in subd. 3 and 4" is set off by commas immediately following the phrase "for equitable relief or for damages" and constitutes an appositive. The Minnesota Supreme Court has held that appositive phrases set off by commas should be construed to modify only the immediately preceding noun, pronoun, or clause,

"unless it is clear that it was intended to apply to subsequent matter." *Dahlberg v. Young*, 231 Minn. 60, 66-67, 42 N.W.2d 570, 575 (1950) (emphasis omitted). But application of the appositive rule does not always result in an unambiguous phrase because the object of the appositive is not always clear. *Compare State v. Bauman*, 552 N.W.2d 576, 577-78 (Minn. App. 1996) (absent evidence of contrary legislative intent, statute was construed so that proviso modified immediately preceding noun), *review denied* (Minn. Nov. 20, 1996) *with Pickands Mather & Co. v. Comm'r of Revenue*, 334 N.W.2d 155, 163 (Minn. 1983) ("We think, however, within the context of this statute, that the concluding phrase 'or any other law' * * * modifies the entire preceding portions of the subdivision rather than merely the immediately preceding clause.") (emphasis omitted). Here, because we see no clear indication as to whether the phrase "as provided in subdivisions 3 and 4" modifies just "damages" or both "damages" and "equitable relief," application of the rules of grammar does not result in unambiguous language.

In interpreting ambiguous language,

> the intention of the legislature may be ascertained by considering, among other matters: (1) [t]he occasion and necessity for the law; (2) [t]he circumstances under which it was enacted; (3) [t]he mischief to be remedied; (4) [t]he object to be attained; (5) [t]he former law, if any, including other laws upon the same or similar subjects; (6) [t]he consequences of a particular interpretation; (7) [t]he contemporaneous legislative history; and (8) [l]egislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (2000). Walser argues that the legislative history shows that subdivision 1 was intended to provide equitable relief for any violation of the tax-increment statute, but limit damages to violations of subdivisions 3 and 4. But review of the legislative history of the 1990 statute reveals only that the legislature intended broad-based grounds for taxpayer enforcement of the TIF statute and does nothing to illumine the specific issue at hand. Indeed, even Walser's proposed construction does not give citizens plenary enforcement power. Knowledge that the legislature sought to grant citizens the power to enforce the TIF laws does not itself answer how that goal was to be achieved.

Respondents ask us to apply the doctrine of *expressio unius est exclusio alterius.*[1] Because Minn. Stat. § 469.1771, subd. 1 (1990), mentions subdivisions 3 and 4, yet omits subdivision 2, they conclude that subdivision 2 was outside the embrace of citizen-taxpayer enforcement. This maxim, however, fails to resolve the ambiguity because Walser has argued that this exclusion is limited to suits *for damages* and does not apply to suits for equitable relief. While the doctrine may help answer the question, "is subdivision 2 excluded?," it does not answer the question, "from what is subdivision 2 excluded?"

---

[1] A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." *Black's Law Dictionary* 581 (6th ed. 1990) (citations omitted). It is only used where it is first determined that the language is ambiguous. *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 17-18 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999).

The omission of subdivision 2 from the citizen-taxpayer enforcement provision may have been, as respondents admit, nothing more than a drafting error. Though in interpreting an act to ascertain and accomplish the legislative purpose, "obvious mistakes and omissions may be corrected or supplied," *Mankato Citizens Tel. Co. v. Comm'r of Taxation*, 275 Minn. 107, 112, 145 N.W.2d 313, 317 (Minn. 1966) (citation omitted), respondents' admission does not by itself transform an ambiguous phrase into an obvious mistake. We do not find the conclusion that the legislature made a mistake to be "obvious."

Respondents argue that, even assuming this were nothing more than a drafting error, this court should not "correct" that error because the legislature already has done so, and has thus prescribed how it was done. Shortly after the formation of the TIF district, the legislature modified the statute to read:

> The owner of taxable property located in the city * * * in which the tax increment financing district is located may bring suit for equitable relief or for damages, *as provided in subdivisions 2, 3, and 4*, arising out of a failure of a municipality or authority to comply with the provisions of sections 469.174 to 469.179, or related provisions of this chapter.

Minn. Stat. § 469.1771, subd. 1(a) (2000) (emphasis added). This modification came ten years after the preceding version of the TIF Act was passed and was enacted in response to an unpublished opinion of the federal district court that construed the 1990 version as excluding taxpayer suits for violation of subdivision 2. *See Nielsen v. City of Roseville*, No. 98-1625 (D. Minn. 1999).

Respondents suggest that the legislative response to the *Nielsen* decision amounts to a modification of the law. But does this interpretation comport with respondents' own admission that the omission of subdivision 2 in the 1990 statute was likely nothing more than a drafting error? In contrast, Walser suggests that the 2000 legislature was, in effect, merely correcting the *Nielsen* court and the drafting error in the 1990 statute. Indeed, where the legislature's intent is difficult to ascertain, a subsequent amendment must not necessarily be read as an intent to change the existing law. *See State v. Andrews*, 297 Minn. 260, 263-64, 212 N.W.2d 863, 865 (1973) (declining to construe the deletion of a statutory clause as a change in the law, where another explanation was equally probable). But what explains the legislature's decision not to specifically apply the remedial statute retroactively?[2]

Unlike the amorphous legislative intent in *Andrews*, here the intent is clear. The legislative history of the 2000 amendment indicates that the legislature had the option of applying the amendment retroactively, but instead applied it prospectively.[3] Even if the legislature intended to merely correct its oversight, its chosen *method* was to change the

---

[2] Although the law neither stated that it should be applied prospectively, nor that it should not be applied retroactively, its effective-date clause stated that the amendment was "effective for violations occurring after [May 15, 2000]." 2000 Minn. Laws, Ch. 490, Art. 11, Sec. 30.

[3] As originally introduced, the section of the amendment adding subdivision 2 to section 469.1771 had the following effective date provision: "This section is effective for violations occurring after December 31, 1990." H.F. 4099, § 16, as introduced (Mar. 13, 2000).

law. Accordingly, the district court did not err in concluding that Minn. Stat. 469.1771, subd. 1 (1990), did not include a private cause of action for the inclusion or retention of property within a TIF district.

## II.

Walser claims that not only did the city err in including certain properties within the TIF district, but also that the city erred in *retaining* those properties. Minn. Stat. § 469.1771, subd. 2 (2000), provides for a taxpayer enforcement suit if the city "includes *or retains* a parcel of property in a tax increment financing district that does not qualify for inclusion or retention within the district." (Emphasis added.)

Respondents argue that because the 2000 statutory amendment was prospective, it should also be applied prospectively with regard to retention. But prospective application of the 2000 amendment simply means that violations occurring after the amendment are actionable. As the retention of the property continued past the effective date of the 2000 amendment, prospective application grants Walser a right to sue for improper retention of property.

Respondents next argue that the retention of the allegedly non-qualifying properties was an ongoing effect of the earlier violation. In effect, respondents argue that the legislature's drafting error not only abrogated Walser's right to enforce the statute that limits the creation of a TIF district, but also that this error carries its effect over into the retention of illegally-retained properties. Respondents cite absolutely no law in support of this interpretation. Minn. Stat. § 469.1771, subd. 2 (2000) explicitly

includes both inclusion *and* retention within the taxpayer's-suit provision. When possible, we construe laws to give effect to all their provisions. Minn. Stat. § 645.16 (2000). We cannot omit the clause "or retains" from the statute.

## III.

Walser's fourth claim alleges that the contemplated expenditure of revenues from the TIF district was unlawful because it did not primarily serve a public purpose.[4]

---

[4] As a preliminary matter, respondents argue that Walser is precluded from challenging whether expenditures are for a primarily public purpose by Minn. Stat. § 469.175, subd. 3 (2000), which states:

> Once approved, the determination of the authority to undertake the project through the use of tax increment financing and the resolution of the governing body shall be conclusive of the findings therein and of the public need for the financing.

Even though Walser is unable to challenge the inclusion of property into the TIF district, this language cannot have the preclusive meaning given to it by respondents. Respondents' construction would effectively eviscerate all taxpayer's rights under Minn. Stat. § 469.1771, subds. 3, 4 (1990, 2000), because if the establishment of the TIF district conclusively determined its legality, then the decisions of any city would be completely insulated from review. The Minnesota Supreme Court has rejected a similar argument, noting that a plaintiff had the right to oppose a municipality's action and that

> such right would carry with it an attendant right to challenge the adequacy of the evidence upon which the municipality based its findings cannot be seriously questioned, for were the rule otherwise, the statutory restrictions would be completely ineffectual.

*Reilly Tar & Chemical Corp. v. City of St. Louis Park*, 265 Minn. 295, 303, 121 N.W.2d 393, 398 (Minn. 1963). We think the same wisdom applies here.

Public money may only be expended for public purposes. *Port Auth. of St. Paul v. Fisher*, 269 Minn. 276, 294, 132 N.W.2d 183, 196 (1964). If "the primary object is to promote some private end, the expenditure is illegal, although it may incidentally also serve some public purpose." *Id.* at 288, 132 N.W.2d at 192 (emphasis omitted). Likewise, "[t]he mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public." *Visina v. Freeman*, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (Minn. 1958).

Here, the district court found that the contemplated expenditure served a public interest. But the key question here is not whether the public interest was served, but rather which purpose is the primary purpose. The district court's findings that the proposed expenditures were for "a public purpose" (emphasis added) because they would be used for land acquisition and public improvements pursuant to Minn. Stat. § 469.002, subd. 14 (2000), is tautological and only begs the question of whether the public purpose is *primary*. The fact that the expenditures are authorized expenditures under the TIF act does not mean that they primarily serve a public purpose.[*] There is no

[*] This inquiry is distinct from the question asked in condemnation proceedings, which is merely whether some evidence exists that the taking serves a public purpose. *Walser I*, 630 N.W.2d at 669. While we are extraordinarily deferential to a city's determination of whether a particular expenditure serves a primarily public purpose, *R. E. Short Co. v. City of Minneapolis*, 269 N.W.2d 901, 907 (1978), we note that the city's discretion is less than that used in condemnation proceedings because, in those cases, the existence of almost any evidence will support a finding of a public purpose. *Walser I*, 630 N.W.2d at 669. Though deference is still required here, the fact that the district court

(Continued on following page)

evidence that the TIF act has abolished the requirement that public expenditures must primarily be for public purposes. Because the district court applied the wrong standard and failed to make comparative findings, we are unable to review the district court's decision on this issue and, of necessity, remand for comparative findings.

## IV.

The district court alternatively concluded that the record at trial established that the creation of the TIF district was lawful in all respects. It was not. The record shows that several aspects of the TIF-district creation were fundamentally flawed.

*"Best Efforts"*

The legislature has directed that the city may not determine whether a property is structurally substandard without an interior inspection of the property, unless, *inter alia*, "the municipality or authority is unable to gain access to the property after using its *best efforts* to obtain permission from the party that owns or controls the

---

must employ the more stringent evidentiary standard requiring that the public purpose to be the "primary purpose" means that a greater quantum of evidence is required. Furthermore, not only must the quantity of the evidence considered be greater, but the quality of the analysis must be different. The expenditure of funds requires a comparative approach; that is to say, analysis of which purpose (public or private) is the primary purpose. *Compare Visino*, 252 Minn. at 184, 89 N.W.2d at 643 (incidental private benefit does not render activity private if primary purpose is public) *with Fisher*, 269 Minn. at 288, 132 N.W.2d at 192 (incidental public benefit does not change nature of otherwise primarily private act).

property." Minn. Stat. § 469.174, subd. 10(c) (2000) (emphasis added).[6]

Respondents argue that the two letters they sent out constituted "best efforts," but such a conclusion would give a very strange meaning to the imperative. Respondents' letters merely stated that they were requesting a voluntary inspection as part of an assessment of "what type" of city redevelopment was to be created. They gave property owners one week to respond. After respondents mailed a cursory second letter giving property owners another week to respond, non-responding property owners were presumed to "not be interested." Respondents made no further efforts to contact the residents even though their approach resulted in only 20% of the buildings being inspected. No phone calls were made, although such practices are typical in TIF projects. No doors were knocked, despite the fact that the area to be inspected was quite small.

If the question posed by Minn. Stat. § 469.174, subd. 10(c), was, as indicated by respondents, whether or not the city made "an effort," clearly the city's methodology would

---

[6] While respondents argue that great deference should be given to the city's determination of whether "best efforts" were used, they do not articulate why this should be the standard. It is, in fact, broader. The determination of whether or not the city complied with the TIF law does not involve a legislative question. The statute sets out the standard to be applied, and the only question is whether the city complied with the law. Here, the facts surrounding the notification letters and the attempts at interior inspections are not disputed. Application of a statute to the undisputed facts of a case involves a question of law, which is reviewed de novo. *Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 402 (Minn. 1996).

have been sufficient. But the statue specifically requires "best efforts." "Best" is defined as "surpassing all others in excellence, achievement, or quality: most excellent." *The American Heritage Dictionary* 178 (3rd ed. 1996). The fact that other, more thorough, methods were readily available, and were often used in other TIF districts, combined with the fact that the city's methodology only achieved a 20% success rate, is powerful evidence that "best" efforts were not utilized.

Respondents argue that there is no specific requirement in the statute to make phone calls, but they miss the point. The statute also does not state that sending two brief letters with two-weeks' total response time is sufficient either. The statute requires "best" efforts, and the efforts needed to satisfy that standard are substantially more than what respondents gave.

*Distribution of the Buildings*

To qualify as a redevelopment district under Minnesota law, the structurally substandard buildings must be "reasonably distributed throughout the district." Minn. Stat. § 469.174, subd 10(a). The city's determination with regard to this factor is quasi-judicial, which is reviewed to determine whether the city "erred as a matter of law, issued a decision unsupported by substantial evidence, or acted arbitrarily or capriciously." *Soo Line R.R. Co. v. City of Minneapolis*, 625 N.W.2d 834, 838 (Minn. App. 2001) (quotation omitted).

Here, even a cursory review of the exhibits submitted reveals that the allegedly substandard properties were not "reasonably distributed" throughout the district at all. All of the allegedly substandard buildings were located in the

north 60% of the district. Furthermore, these two groups of properties are easily distinguishable. While the northern properties were mostly residential homes and apartments, the southern properties were all large businesses with frontage on I-494. 77th Street, which divides the northern portion from the southern, is a clear dividing line between these two groups of properties. Almost all of the structures north of 77th street were determined to be substandard. Very few allegedly substandard properties were south of 77th street – all of which were on the north side of blocks between I-494 and 77th street with frontage on 77th street, and not I-494. The fact that inclusion of certain property may increase the value of a redevelopment district does not excuse the requirement that structurally substandard properties be reasonably distributed throughout the district.

*Methods for Determining Conditions of Buildings*

As noted, in order for the Interchange West Area to be designated as a redevelopment TIF district, more than 50% of the buildings in the district must be "structurally substandard to a degree requiring substantial renovation or clearance." Minn. Stat. § 469.174, subd. 10 (a)(1) (2000). "Structurally substandard" is defined as:

> containing defects in structural elements or a combination of deficiencies in essential utilities and facilities, light and ventilation, fire protection including adequate egress, layout and condition of interior partitions, or similar factors, which defects or deficiencies are of sufficient total significance to justify substantial renovation or clearance.

Minn. Stat. § 469.174, subd. 10(b) (2000). Walser challenges the methodology used by respondents to determine that buildings were structurally substandard.[7]

> A building is *not* structurally substandard if it is in compliance with the building code applicable to new buildings or could be modified to satisfy the building code at a cost of less than 15 percent of the cost of constructing a new structure of the same square footage and type on the site. The municipality may find that a building is not disqualified as structurally substandard under the preceding sentence on the basis of reasonably available evidence, such as the size, type, and age of the building, the average cost of plumbing, electrical, or structural repairs, or other similar reliable evidence.

---

[7] The parties have significantly different conceptions of the applicable standard of review. As the term "structurally substandard" is a statutory provision, complete with a built-in definition and methodology for determining whether a building is structurally substandard, *see* Minn. Stat. § 469.174, subd. 10 (2000), interpretation of this statute should be reviewed de novo. *See Brookfield Trade Ctr.*, 584 N.W.2d at 393. But the city's consideration of the evidence in light of the statutory mandate is a quasi-judicial function. The indicia of quasi-judicial actions are "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." *Maye v. University of Minnesota*, 615 N.W.2d 383, 386 (Minn. App. 2000) (quoting *Minnesota Ctr. for Envtl. Advocacy v. Metropolitan Council*, 587 N.W.2d 838, 842 (Minn. 1999)) (citation omitted). This court reviews a city's quasi-judicial decisions to determine whether the city council "erred as a matter of law, issued a decision unsupported by substantial evidence, or acted arbitrarily or capriciously." *Soo Line R.R.*, 625 N.W.2d at 838 (quotation omitted).

Minn. Stat. § 469.174, subd. 10(c) (emphasis added). Even if a municipality has used its best efforts to gain access to a property, those properties that do not receive interior inspections may not be determined to be structurally substandard unless "the evidence otherwise supports a reasonable conclusion that the building is structurally substandard." ***Id.***

YHR conducted the structurally substandard analysis for the residential properties. As noted, YHR initially noted that the properties were generally in good condition and that the standard methodology for determining whether structures were structurally substandard would not achieve the "desired results." After consulting with the city, YHR then proceeded to employ an alternative approach involving life-cycle or depreciation analysis. The city adopted YHR's findings resulting from this analysis. Although an extensive review of YHR's methods may not be necessary, certain errors are readily apparent.

First, although Minn. Stat. § 469.174, subd. 10(c), specifically provides a mathematical formula for determining, for certain, when a building is *not* structurally substandard, YHR flipped this guideline around; every property that the statutory formula did not specifically except from those potentially structurally substandard was determined to be structurally substandard. There is no legal basis for this methodological assumption.

Second, in assessing the code deficiencies of properties without interior inspections, YHR extrapolated from the results of the 15 homes that they actually inspected, to determine the condition of the remaining homes. At the same time, in determining the homes' replacement costs, YHR did not employ similar extrapolations to determine

how many of the uninspected properties had certain improvements.

Third, YHR selected a depreciation model that resulted in cost estimates for the same items varying wildly between homes and were overstated as compared with actual costs. YHR's analysis also contained numerous mathematical and depreciation flaws. The numerous flaws in the data considered by YHR resulted in the district court doubting the accuracy of YHR's replacement values as too low and their estimates of the cost of corrections to the code violations as too high.

Fourth, an overwhelming majority of the cost of code compliance consisted of the cost of compliance with the energy code. The unrebutted testimony of several experts, including one of YHR's own consultants was that violations of the energy code were not "structural." While the energy code may be sound public policy, the determination of whether energy code deficiencies should be included in the consideration of whether a property is "structurally substandard" is a matter of statutory construction, a question of law reviewed de novo. ***Brookfield Trade Ctr.***, 584 N.W.2d at 393. There is absolutely no basis for concluding that substandard insulation is a structural deficiency or a deficiency "in essential utilities and facilities." ***See*** Minn. Stat. § 469.174, subd. 10 (b) (defining "structurally substandard"). Furthermore, consideration of modern insulation standards as a component of whether a building is structurally substandard might result in all but the most modern homes being determined to be "structurally substandard." Accordingly, consideration of the energy code in determining whether properties were structurally substandard within the meaning of Minn. Stat. § 469.174, subd. 10 was error.

Fifth, when considering uninspected properties, the TIF act provides that evidentiary items that support a finding that a building is structurally substandard include "recent fire or police inspections, on-site property tax appraisals or housing inspections, exterior evidence of deterioration, or other similar reliable evidence." YHR did not review any such documents or other similar reliable evidence.

When viewed as a whole, the methodology employed by YHR for determining whether the subject properties were structurally substandard was rife with inaccuracies. The statute provides several significant layers of protection for municipal taxpayers and property owners, most of which were ignored here. First, the statute strongly advocates interior inspections and alternatively provides that a determination may be made by other evidence "similarly reliable" to common types of interior inspections used to determine the structural adequacy of particular properties. Minn. Stat. § 469.174, subd. 10. Second, the statute prevents gerrymandering of TIF districts by requiring substandard properties to be "reasonably distributed" throughout the district. Minn. Stat. § 469.174, subd. 10 (a). Finally, the statute provides a limited definition of what constitutes substandard property.

The actual procedure implemented by the city and HRA consisted of two minimalist contact letters with short turn-around times that resulted in only 20% of the buildings receiving interior inspections. For the remaining 80% of the properties in question, respondents only made a cursory review of some of the less reliable inspection records available and educated guesses about the interior conditions in the homes at issue. Finally, the city conveniently drew the TIF district lines to include the valuable

property with I-494 frontage even though none of the allegedly substandard buildings were found within this region.

Tax-increment financing is a power granted to municipalities by the legislature to be exercised only within the constraints of the legislative fiat. Exhibiting a particular municipal meanness, respondents completely ignored the statutory prerequisites for exercise of this financing tool. The provisions of Minn. Stat. § 469.1771 (2000) are intended to provide a means to ensure that such a blatant disregard for limits on municipal authority will be answerable.

## V.

Walser's claim under Count III is that the expenditure of the TIF funds was in violation of Minn. Stat. § 469.176. The district court concluded that

> the TIF funds would be used for land acquisition and public improvements which are authorized uses of TIF funds pursuant to the TIF Act, and consistent with the TIF plan.

Walser has not challenged the dismissal of this count in either of its briefs. Issues not briefed on appeal are waived. ***Melina v. Chaplin***, 327 N.W.2d 19, 20 (Minn. 1982).

## VI.

Walser challenges the fees awarded to respondents. As the prevailing party in this action, respondents were entitled to reasonable costs and attorney fees under Minn. Stat. § 469.1771. But because we reverse and remand the

district court's decision, the district court's determination regarding fees – premised on its determination of which party prevailed – should also be revisited on remand.

## DECISION

The district court erred by dismissing count I and II of the complaint and by applying the wrong standard in dismissing count IV. The district court's alternate ground for dismissal, that the tax-increment-financing district was created lawfully, was also in error.

**Reversed and remanded.**

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT
Case Type: Condemnation

---

The Housing and Redevelopment Authority in and for the City of Richfield, a public body corporate and politic under Minnesota law,

Petitioner,

v.

WALSER AUTO SALES, INC., a Minnesota corporation; et al.,

Respondents.

---

Court File No. CD-2604

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER APPOINTING COMMISSIONERS**

(Filed Jan. 19, 2001)

The above-entitled proceeding came on for hearing before the undersigned Judge of this Court in the Hennepin County Government Center, Minneapolis, Minnesota, on December 4, 5, and 6, 2000, on Petitioner's motion for condemnation pursuant to Minn. Stat. §117.042.

Petitioner Housing and Redevelopment Authority ("HRA") in and for the City of Richfield ("City") appeared by its attorneys, John M. LeFevre, Jr., Esq. And Joe Y. Yang, Esq. Bradley Gunn of Leonard, Street and Deinard, P.A., and Bruce D. Malkerson, Esq., of Malkerson Gilliland Martin, LLP, appeared for Respondents

Walser Auto Sales, et al. There were no other appearances.

Having heard the evidence adduced at the hearing and the arguments of counsel, and based on all the files and records herein, the Court makes the following findings of fact, conclusions of law and order appointing commissioners.

## FINDINGS OF FACT

1. That the HRA is a corporate public body of the City, a municipal corporation duly organized and existing under the laws of the State of Minnesota, with all the powers enumerated in Minnesota Statutes, Sections 469.001 to 469.047 (the "Act").

2. That the HRA has commenced an action in eminent domain in this court whereby it seeks to acquire fee title to the real property as described in the Petition (the "Subject Property"), for a redevelopment project. The Subject Property is located in the northeast quadrant of Interstate Highway 494 ("I-494") and the Penn Avenue interchange in the City and is legally described in the petition.

3. That Robert J. Walser, Paul Walser, and Andrew Walser are the fee owners of the subject property.

4. That the Walser family has owned property at this location since 1974, and at all times relevant herein has successfully used the property for automobile dealership and franchise purposes.

5. That the subject property is presently leased to Walser Auto Sales, Inc., which operates a Buick and an

Isuzu franchise, and Motorworks, Inc., which operates a BMW franchise.

6. That the subject property has been upgraded and improved over the years, including substantial demolition and construction in 1988 for what is now the BMW facility.

7. That the redevelopment project for which condemnation of the Subject Property is necessary contemplates the construction of a 1.5 million square foot office facility for the corporate headquarters of Best Buy Co., Inc. ("Best Buy") and certain public improvements ("Project"), including the reconstruction of the bridge spanning I-494 at Penn Avenue ("Penn Avenue Bridge").

8. That between 1975 and 1993, there have been several redevelopment projects reviewed and adopted within the City. These projects were as follows: the Lyndale/Hub/Nicollet Commercial Improvement Plan ("LHN Plan") (1975), the Interstate Lyndale Nicollet Redevelopment and Tax Increment Financing Plan ("ILN Plan") (1985), the Cedar Avenue Business Area Redevelopment Project Redevelopment Plan and Tax Increment Financing Plan ("CABA Plan") (1985), the Penn Avenue and Sixty Sixth Street Redevelopment Project Plan and Tax Increment Financing Plan ("PASSS Plan") (1989) and Richfield Rediscovered Redevelopment Project Area A and Tax Increment Financing District A-1 and Richfield Rediscovered Redevelopment Project Area B and Tax Increment Financing District B-1 ("Project Area A Plan" and "Project Area B Plan") (1990). Each of these projects was an independent redevelopment project.

9. That in 1993, in order to improve the availability and management of funding for the various redevelopment

projects, the City grouped its redevelopment projects and additional property under one redevelopment plan, the Redevelopment Plan for the Richfield Redevelopment Project Area ("Redevelopment Plan"). Initially, the Subject Property was not included within the boundaries of the Redevelopment Plan.

10. That the Redevelopment Plan went through the regular steps for the appropriate municipal approvals. The HRA staff reviewed the Redevelopment Plan and recommended that it be adopted by the HRA Board of Commissioners ("HRA Board"). The HRA Board adopted Resolution No. 476 on May 17, 1993 approving the Redevelopment Plan. Resolution No. 476 included a finding that "the HRA has identified blighted areas within the city as being in need of development and redevelopment which are not currently within the boundaries of existing Project Areas."

11. That the Redevelopment Plan was then sent to the City's Planning Commission ("Planning Commission"). The Planning Commission staff reviewed the Redevelopment Plan and recommended adoption of a resolution finding that the Redevelopment Plan was in conformance with the City's comprehensive plan. On May 31, 1993, the Planning Commission adopted Resolution #670 finding that the Redevelopment Plan was in conformance with the City's comprehensive plan.

12. That the staff then reviewed the redevelopment plan and recommended that the City Council approve the Redevelopment Plan. The City Council adopted Resolution No. 8030 approving the Redevelopment Plan on June 14, 1993. The City Council Resolution No. 8030 included findings that "the Council and HRA have identified

blighted areas within the city as being in need of development and redevelopment which are not currently within the boundaries of existing Project Areas" and "development proposed in the Richfield Redevelopment Plan and the Modified Plans could not reasonably be expected to occur solely through private investment within the reasonably foreseeable future."

13. That the Redevelopment Plan includes a statement of public purpose that:

> Public interest requires the replanning and rehabilitation of residential and commercial neighborhoods across the City to remedy conditions of underutilized land, to correct numerous traffic and pedestrian hazards, to improve substandard and unsafe housing units, to increase the property tax base, to increase employment, and to encourage the expansion of private enterprise.

14. That the Redevelopment Plan also states that:

> The HRA has further determined that the welfare of the City requires active promotion, attraction, encouragement and development of economically sound industry and commerce through government action for the purpose of preventing the emergence of blight and the occurrence of conditions requiring redevelopment.

15. That furthermore, the Redevelopment Plan also states that there are "blighted areas" in the Project area that:

> Include buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive

land coverage, deleterious land use, or obsolete layout, or any combination of these factors, are detrimental to the safety, health, morals or welfare of the City.

16. That the Redevelopment Plan also identifies the following as goals and objectives from the Redevelopment Plan that would not be obtainable in the foreseeable future without HRA intervention in the normal development process:

Goals:

a. To provide a revenue base to meet the needs of Richfield.

b. To develop job opportunities for area residents.

c. To develop strategies to encourage revitalization.

d. To maintain a positive business environment.

e. To enrich the quality of life for residents through planning of the interrelationship of land use.

f. To recognize the needs of all segments of the populace through diversity in housing stock which is a major determinant of the living environment.

Objectives:

a. To achieve a high level of design quality through use of design features such as landscaping to enhance the physical environment.

b. To better utilize vacant or underdeveloped land.

c. To improve vehicular circulation by providing a comprehensive system which provides good direct access to and from the commercial areas. To the extent practical, eliminate commercial traffic from residential streets and minimize vehicular circulation conflicts or congestion.

d. To achieve a balanced variety of commercial businesses and services appropriate to the market area.

e. To provide increased employment opportunities.

f. To diversify the tax base of the community.

g. To eliminate or reduce the conflicts which result from incompatible land use relationships, especially between residential and non-residential.

h. To protect the single-family residences from the adverse effects of nearby commercial development, roadways and off-street parking.

i. To utilize landscaping and/or screening between all single-family residential and commercial/office uses. Landscapping and/or screening should also be provided along major thoroughfares which border residential areas.

j. To eliminate unsightly and blighting elements such as exposed trash storage areas, overhead utility lines, poorly maintained and excessively large billboards or signs, and deteriorated structures.

k. To provide for the elimination of blight which is evidenced by irregular sized lots, inadequate streets, incompatible land uses, physical and functional obsolescence, and inadequate parking.

l. To encourage the sharing of parking facilities and to generally improve the parking and circulation in the area.

m. To provide public utilities and other public facilities of sufficient quality and size to support the future development in the area.

n. To provide for an expanded range of housing opportunities in the community, as appropriate.

o. To encourage open lines of communication between all the residents, businesses and city staff.

p. To provide maximum opportunity, consistent with the needs of the city for development by private enterprise.

q. To coordinate elements of the City's Comprehensive Plan with these project objectives.

r. Provide jobs within close proximity of the residential population and concurrently saving energy by reducing trip time to jobs.

s. Provide a retail service level required by the residents of the community.

t. Secure the increase of housing, commercial, and industrial property subject to taxation by the City, Independent School District No. 280, Intermediate School District No. 287,

Hennepin County, City, and other taxing jurisdictions in order to better enable such entities to pay for governmental services and programs required to be provided by them.

u. Encourage local business expansion, improvements, rehabilitation, and development, whenever possible and provide financial incentives for same.

v. Combine the elements of other City Plans with these project activities.

17. That in October 1996, the Interchange Redevelopment Project was proposed, reviewed, established and added to the Richfield Redevelopment Project area by modification. This is the area immediately to the west of I-35W in the northwest quadrant of the intersection of I-494 and I-35W. It was the location of the Naegele office building and is the current location of Galyan's, a retail sporting goods store. It is located immediately to the east of the Interchange West Project area.

18. That in 1998, in response to a proposal by a development company, CSM Corporation ("CSM"), the City and HRA sought to add property suitable for redevelopment and to redefine the boundaries for redevelopment in the Redevelopment Plan. The City and HRA undertook a Modification to the Redevelopment Plan for the Richfield Redevelopment Project Area ("Modification"). The purpose for the Modification was to expand the boundaries of the Redevelopment Plan project area to include the Interchange West area. The Modification included the Subject Property within the new redevelopment boundaries.

19. That the Modification also modified the Redevelopment Plan to include the establishment of the Interchange West and Lyndale Gateway Tax Increment Financing District ("TIF District") and adoption of the related tax increment financing plan ("TIF Plan") to serve as a funding source for implementing the Modification.

20. That the Modification, TIF District and TIF Plan went through the regular steps of approval of a redevelopment project, beginning with HRA review. The HRA staff recommended adoption of Resolution No. 710 relating to the Modification, TIF District and TIF Plan and the HRA Board of Commissioners adopted such resolution on May 17, 1999.

21. That the Modification, TIF District and TIF Plan then went to the Planning Commission for review. Planning Commission staff recommended adoption of a resolution finding that the Modification, TIF District and TIF Plan conformed to the general plans for development and redevelopment of the City as a whole. The Planning Commission followed its staff recommendation and adopted Resolution No. 123 on May 25, 1999.

22. That after the Planning Commission adopted Resolution No. 123, the City published notice of a public hearing to be held on June 14, 1999 regarding the Modification, TIF District and TIF Plan.

23. That prior to the June 14, 1999 public hearing, the City staff reviewed the Modification, TIF District and TIF Plan and recommended adoption of a resolution adopting the Modification and TIF Plan and establishment of the TIF District. After the public hearing, the City Council approved the plan by adopting Resolution No. 8742.

24. That the stated public purpose for the Modification referred to the public purpose in the Redevelopment Plan which was in part to prevent the emergence of blight.

25. That the TIF Plan and City Council Resolution included a finding that "An inspection of the buildings located within the Interchange West and Lyndale Gateway Tax Increment Financing District finds that more than 50 percent of the buildings are structurally substandard as defined in the TIF Act." The TIF Plan included "facts and reasons" that supported each of the findings in the TIF Plan.

26. That the above findings were based on a report prepared by an architectural planring firm, YHR Partners, entitled Report of Procedures Used and Results Obtained for Determining Tax Increment Financing District Eligibility of Proposed Interchange West Redevelopment District ("YHR Report") and the recommendations of the City staff and City financial consultants. The YHR evaluated all of the residential properties in the area. Tom Goodoien ("Goodoien"), who conducted building analysis for establishment of redevelopment projects and TIF Districts for the Minneapolis Community Development Agency for over thirty-five years prepared a report like the YHR Report for all of the commercia properties in the TIF District ("Goodoien Report"). The YHR Report dated November 5, 1998 incorporated the Goodoien Report dated October 26, 1998 and detailed the procedures used and conclusions reached by YHR and Goodoien in surveying all of the parcels in the proposed TIF District. The report of Goodoien, in particular, found several of the commercial properties to be both "structuraly substandard" and "blighted." Walser at that time did not object to the formation of the TIF District or to the proposed use of tax

increment financing nor did they appear at the public hearing adopting the district to object.

27. That YHR Partners and Goodoien concluded that 91 percent of the buildings evaluated were "structurally substandard" within the meaning of Minn. Stat. § 469.174, subd. 10.

28. That the City and YHR Partners engaged in considerable discussions as to the appropriate methodology to be used in making its report. The report itself contains several obvious errors (i.e. air conditioning, amount of electrical amp service, three season porches). The conclusions reached by the report are challenged by Walser experts as inadequate, wrong, and exaggerated.

29. That the adoption of the Modification, TIF Plan and TIF District were in response to a CSM's proposed redevelopment project ("CSM Project"). The CMS Project anticipated construction of a hotel with retail, office and housing components near the Subject Property. Walser properties would not have been taken as part of the CSM project. In July of 1999, however, CSM lost the hotel anchor for the CSM Project and eventually abandoned the CSM Project in its entirety.

30. That the HRA later commenced negotiations with Best Buy and eventually reached an agreement with respect to a redevelopment project that included the Subject Property. The negotiations culminated in the execution of a Contract for Private Development between the HRA and Best Buy dated March 28, 2000 ("Redevelopment Contract").

31. That pursuant to the Redevelopment Contract, Best Buy is required to construct certain "Minimum Improvements," defined as a corporate office facility of 1.5 million square feet and related improvements in accordance with its conceptual plan. This obligation of Best Buy is conditioned on acquisition of all the property needed for the Project ("Development Property") by February 1, 2001, commencement of construction in April, 2001, and substantial completion of construction by October, 2002. The Development Property is expected to have a minimum market value for tax purposes as of January 2, 2003 of at least 148 million dollars. The HRA is obligated to provide public assistance in furtherance of the redevelopment. The HRA agrees to provide for construction of certain public improvements, including improvement of the Penn Avenue Bridge and 76th Street and others. The developer, Best Buy, represents that it would not undertake the proposed development but for the tax increment financing assistance being provided by the HRA.

32. That Best Buy has executed purchase agreements for all of the properties necessary for the Project except the Subject Property. After attempts to acquire the Subject Property on a voluntary basis failed, the HRA authorized the use of eminent domain to acquire the Subject Property. The HRA staff recommended and on July 17, 2000 the HRA adopted Resolution No. 771 authorizing the use of eminent domain for acquisition of the Subject Property.

33. That on or about June 2000, the City commenced the process of preparing the mandatory Environmental Impact Statement ("EIS") for the proposed project. The City found the final EIS adequate on December 11, 2000.

34. That the City amended its Comprehensive Plan and zoning of December 11, 2000, to conform with the proposed project.

35. That on or about August 22, 2000, the HRA filed a Petition to acquire the Subject Property. Subsequently, October 16, 2000, the HRA staff recommended that the HRA approve a resolution authorizing the use of "quick take" for pending condemnation actions within the TIF District. On October 16, 2000, the HRA passed Resolution No. 786 authorizing "quick take" of the Subject Property pursuant to Minn. Stat. § 117.042. The HRA also adopted a resolution approving the appraised value of the subject Property. A Notice of Intent to acquire the Subject Property pursuant to Minn. Stat. § 117.042 was then served and filed on all the owners and parties in interest on or about October 27, 2000.

36. That on November 27, 2000, the HRA staff recommended approval and the HRA approved the First Amendment to the Contract for Private Development with Best Buy Co., Inc. ("First Amendment"). Primarily, the First Amendment modified the method and amount of financing.

37. That the purpose of HRA Resolution No. 771 is to enable the HRA to acquire real property necessary to proceed with a redevelopment project in the City.

38. That Resolution No. 771 also states that:

> It is necessary to acquire the Properties as described below in this resolution in order for the HRA to carry out the purposes of the Plans, as modified, and the Act, to deal with properties that are structurally substandard and to eliminate and prevent the development or spread of

conditions of blight found to exist by the City and HRA.

39. That the public purpose for the taking of the Subject Property is the implementation of the Redevelopment Plan and Modification pursuant to Minn. Stat. § 469.012, Subd. 1(6) by permitting the HRA to acquire the Subject Property for redevelopment and to eliminate and prevent the emergence of blight. The City has found that the Subject Project furthers redevelopment goals and objectives by eliminating blight and incompatible uses and replacing them with uses which are consistent with the City's long-term land use plans. The Project eliminates blight, under-utilized property, vacant property and incompatible uses, all of which have been identified as goals in the City's Redevelopment Plan.

40. That the HRA has also determined that the Subject Property is a necessary part of the Project.

41. That the public purpose stated in the Modification restates the public purpose identified in the Redevelopment Plan, specifically that the "public interest requires the replanning and rehabilitation of residential and commercial neighborhoods across the City to remedy conditions of underutilized land, to correct numerous traffic and pedestrian hazards, to improve substandard and unsafe housing units, to increase the property tax base, to increase employment, and to encourage the expansion of private enterprise."

42. That the Petition found it "necessary and for a public purpose to acquire fee simple title to the real estate described on *Exhibit A* attached hereto and incorporated herein in order to implement the provisions of the redevelopment plan for the Richfield Redevelopment Project Area,

as amended, consistent with Petitioner's Board of Commissioners' Resolution No. 771 adopted July 17, 2000."

43. That the proposed project cannot proceed until the final development plan is approved, a conditional use permit is obtained, an indirect source permit is obtained, and modifications to the TIF Plan are approved, among other things. As of the date of the hearing on this matter, none of these permits or approvals have been obtained.

44. That the City and the HRA have taken numerous actions (e.g. proceeding with rezoning and Comprehensive Plan amendments, commencing this condemnation action, entering into the Development Agreement and amending same, TIF analyses and approvals, etc.) and expended substantial funds, totaling in excess of $1 million, for which the City will not be reimbursed unless the Best Buy Project is built.

45. That the relocation services and assistance that the City has provided to the Walsers consists of a letter dated September 13, 2000, from the City's relocation consultant to Walser Buick Isuzu. The Walsers misinterpreted the letter and ignored it.

46. That Walser has purchased property in the City of Bloomington and received zoning approval and has commenced demolition, construction and remodeling of the property for use by the various Walser dealerships. This property will be available no later than June 15, 2001 for occupancy by Walser.

47. That in May, 2000, the firm of Anton, Lubov & Associates, Inc. prepared a report entitled "The Economic Impact of the Proposed Best Buy Campus in Richfield," at the request of Best Buy. Best Buy submitted the Anton

Report to the City Council. The following are some additional economic benefits identified in the Anton Report that will result from the Project:

a. The Best Buy Campus will employ 5,500 people opening in 2002 and as many as 7,500 people as Best Buy employment grows in the future.

b. The net increase of jobs created by the Project amounts to approximately a 25 percent increase in the number of people working at locations inside Richfield.

c. The workers from Best Buy are expected to spend an estimated 14 million dollars per year at retail businesses in Richfield – a substantial increase from the estimated 2 million dollars spent annually by workers and residents with the TIF District.

d. Beginning in 2002, the Best Buy Campus will generate roughly 7.3 million dollars in property taxes.

e. Approximately $670,000 of the property taxes per year will be placed in a housing trust fund for development and upgrading of the City's housing stock.

49. That the City opines some of the other public benefits from the Project include:

a. Richfield's competitive position among communities in the Metropolitan area will be strengthened.

b. The housing market for both single family homes and apartments in Richfield will be strengthened.

c. There will be a significant advance in upgrading the southern edge of Richfield, which is very visible due to its proximity to I-494.

d. The reconstruction of the Penn Avenue bridge over I-494 will be advanced by at least eight years.

e. The Project will enhance Richfield as an employment center.

f. The Project will provide opportunities for Richfield organizations to become stronger in that many Best Buy employees support efforts of community organizations.

49. That the Subject Properties to be taken and acquired are situated in the City of Richfield, County of Hennepin, State of Minnesota.

50. That the Court incorporates the Findings in court file number AP 09-11027 herein.

## CONCLUSIONS OF LAW

1. That the HRA's petition is granted and the HRA is authorized by law to acquire the real estate described in its petition herein, as amended, under the procedures specified in Minn. Stat. Chapter 117 (1998) and other law.

2. That the HRA has shown that the taking is for a public use and purpose, is necessary and convenient in furtherance of a redevelopment project within the City of Richfield, and that the acquisition is required prior to the filing of an award of commissioners.

3. That the HRA has complied with all the legal requirements for obtaining title and possession pursuant to Minn. Stat. § 117.042 (1998) subject to Walsers' right to remain on the property pursuant to a lease (approved by the Court if the parties cannot agree or other arrangements agreed to by the parties) until 12:00 midnight on June 15, 2001.

WHEREFORE, the Court makes the following:

**ORDER TRANSFERRING TITLE AND POSSESSION**

4. That pursuant to Minn. Stat. § 117.042, Petitioner may deposit with the District Court Administrator for this Court or pay to the owners an amount equal to Petitioner's approved appraisal of value of the Subject Property which is $9,450,228.00 GL 2/6/1

5. That on or after ~~the date hereof,~~ February 1, 2001, GL 2/6/1 the District Court Administrator is directed to accept the deposit of such amounts. The deposit(s) shall be held in interest-bearing accounts for the benefit of the parties with ownership interests in the Subject Property.

6. That upon the filing with the Hennepin County Recorder and/or Registrar of Titles, as the case may be, of a certified copy of this Order and either (i) an affidavit of Petitioner's attorney or receipt of the owner evidencing payment to the owner; or (ii) the receipt of the District Court Administrator or Accountant confirming receipt of each such deposit with respect to the Subject Property, title and the right of possession of the real estate interests being acquired herein, as described in the petition shall,

without further notice, immediately vest in the Petitioner (except as noted in paragraph 3 above).

7. That immediately following said deposit, said District Court Administrator shall, from said deposited funds, pay to the City of Richfield and County of Hennepin (a) all real estate taxes payable in the year 2000 and prior years, including all special assessments and future installments thereof, unpaid on the property as of the date of filing of this Petition; and (b) any Public Works charges (water, sewer, garbage, etc.) or other charges as are unpaid on or before the date hereof (the "quick-take" date), or the date of the Commissioners' Award, whichever is earlier.

All of such payments to the City of Richfield and/or the County of Hennepin as provided for in this paragraph 4 shall include interest and penalties payable therewith, if any, due on the date of deposit of said amounts into Court pursuant to said § 117.042.

In the event that said deposited funds are insufficient to pay all of the above-mentioned taxes and assessments, the amount deposited shall be applied toward such taxes and assessments and the balance of such taxes and/or assessments shall be paid from any additional amounts awarded by the Commissioners or the Court with respect to that parcel of the Subject Property. However, pursuant to Minn. Stat. §§ 117.125, subd. 1 and 272.68, subd. 1, in no event shall Petitioner be required to pay accrued taxes and/or unpaid assessments or any other charges on the property acquired herein which exceed the fair market value of any parcel of the Subject Property. The fair market value of each parcel of the Subject Property will be

that amount determined by the court-appointed Condemnation Commissioners as the award of damages for that parcel of the Subject Property.

8. That the owner(s) and all persons occupying the Subject Property must vacate the Subject Property and remove all personal property on or before 11:59 p.m. on June 15, 2001. All advertising signs or devices, if any, located on the Subject Property must also be removed on or before 11:59 p.m. on June 15, 2001.

9. That Petitioner shall give written notice of the fact of each said deposit or payment to all parties previously appearing in this proceeding with respect to the Subject Property.

10. That this Order does not preclude any party from offering valuation evidence, and seeking an award of damages, different from Petitioner's approved appraisal amount.

11. That the Court retains jurisdiction of this matter for the purpose of granting the parties such other and further relief as may be necessary and appropriate to implement the provisions of this Order and to otherwise transfer title and the right to possession of the interests required herein to Petitioner in accordance with the provisions of Minn. Stat. § 117.042.

WHEREFORE, the Court makes the following:

**ORDER APPROVING PETITION**

IT IS HEREBY ORDERED THAT Julian Hook, Michael O'Toole, and Phillip Smith are hereby appointed as commissioners, all being residents of the County of

Hennepin, to ascertain and report the amount of damages, if any, that will be sustained by the parties named as having an interest in the real estate described in the petition herein. The said commissioners shall be paid and shall undertake their duties in accordance with the Policy of the District Court Concerning Condemnation Commissioners.

The above-named commissioners shall meet on ~~January~~ February 8, 2001, at 11:30 A.m. at the Civil Filing desk, Second Floor of the Hennepin County Government Center, for the purpose of taking the oath of commissioners. The above-named commissioners shall file their award of damages as to the property described in the petition, no later than 180 days from the date of this Order, unless such time is extended by further order of this Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December ___, 2000

BY THE COURT:

1/19/1

/s/ Gary Larson
Gary Larson
Judge of District Court

---

**MEMORANDUM OF LAW**

Trial was held in the above-captioned matter on December 4, 5 and 6, 2000. The Petitioner HRA, in and for the City, asserts its position that it has met the public purpose and necessity requirements for the taking of the property that is the subject of these proceedings. The HRA

has also argued that it is entitled to an order transferring title pursuant to Minn. Stat. § 117.042 ("Quick Take"). The Respondents assert, among other things, that the HRA does not have the authority to acquire property for redevelopment, that there is no public purpose, and that the subject area is not blighted.

## INTRODUCTION

This dispute presents important public issues concerning the right of successful property business owners to remain at a location they consider the "best location in the country" versus a City's right to control and guide the City's future zoning, housing and redevelopment.

The City of Richfield has chosen to invoke the awesome powers of eminent domain with the attendant special financing techniques known as tax increment financing to remove seventy-four low and moderate income housing units and an "underutilized or undesirable" commercial area so that the national headquarters of Best Buy, a very successful Minnesota business, may be relocated there. This involves forcing the Walser car dealerships to relocate to a spot that they consider less desirable.

The Court recognizes the significance of these competing interests and the validity of each of the party's positions. This Court, however, does not get to decide which position it would choose to be in the best interests of the Richfield community and citizens.

The Court finds that in these cases (condemnation and TIF challenge) the Court must defer to the reasonable legislative action of the City because there is sufficient evidence of both public purpose and necessity for the

taking (in the condemnation) and the City's not being arbitrary or capricious in the formation of the TIF district.

The Court does grant the condemnation Petition of the City and dismisses Walser's challenges to the condemnation in this action and dismisses the challenges to the formation of the tax increment financing district in that action.

## FACTS

The HRA commenced these proceedings to acquire certain real property located in the northeast quadrant of Interstate Highway 494 ("I-494") and Penn Avenue in the city of Richfield ("City") for the purpose of carrying out a redevelopment project in that area. Respondents Walser Auto Sales et al. ("Walser") are the fee owners or parties with an interest in the Subject Property and have raised several objections to the condemnation proceeding.

## AUTHORITY FOR CONDEMNATION

The HRA is a corporate public body created in 1974 pursuant to the provisions of Minn. Stat. §§ 469.001 to 469.068. The HRA has the authority to acquire land using the power of eminent domain pursuant to Minn. Stat. § 469.012, Subd. 1(6) which authorizes the HRA to acquire property for a redevelopment project.

## 1993 REDEVELOPMENT PLAN

In 1993, in order to improve the availability and management of funding for the various redevelopment projects, the City grouped its redevelopment projects and additional property under one redevelopment plan, the

Redevelopment Plan for the Richfield Redevelopment Project Area ("Redevelopment Plan"). Initially, the Subject Property was not included within the boundaries of the Redevelopment Plan.

The Redevelopment Plan went through the normal Steps for the appropriate municipal approvals. The HRA staff reviewed the Redevelopment Plan and recommended that it be adopted by the HRA Board of Commissioners ("HRA Board"). The HRA Board adopted resolutions approving the Redevelopment Plan. The HRA included a finding that the HRA has identified blighted areas within the city as being in need of development and redevelopment which are not currently within the boundaries of existing Project Areas.

The Redevelopment Plan was then sent to the City of Richfield's Planning Commission ("Planning Commission"). Planning Commission staff reviewed the Redevelopment Plan and recommended adoption finding that the Redevelopment Plan was in conformance with the City's comprehensive plan. On May 25, 1993, the Planning Commission adopted a finding that the Redevelopment Plan was in conformance with the City's comprehensive plan.

Richfield City staff then reviewed the redevelopment Plan and recommended that the City Council approve the Redevelopment Plan. The City Council adopted the Redevelopment Plan on June 14, 1993. The City found that "the Council and HRA have identified blighted areas within the city as being in need of development and redevelopment which are not currently within the boundaries of existing Project Areas" and "development proposed in the Richfield Redevelopment Plan and the Modified Plans could not

reasonably be expected to occur solely through private investment within the reasonably foreseeable future."

## 1999 MODIFICATION TO 1993 REDEVELOPMENT PLAN AND ESTABLISHMENT OF TIF DISTRICT AND ADOPTION OF TIF PLAN

In October 1996, the Interchange Redevelopment Project was proposed, reviewed, established and added to the Richfield Redevelopment Project area by modification. This is the area immediately to the West of I-35W in the northwest quadrant of the intersection of I-494 and I-35W. It was the location of the old Naegele Building and the current location of the Galyan's store. It is located immediately to the East of the Interchange West Project area.

In 1998, in response to a proposal by CSM Corporation ("CSM"), the City and HRA sought to add property suitable for redevelopment and to redefine the boundaries for redevelopment in the Redevelopment Plan. The City and HRA commenced action to adopt the Modification to the Redevelopment Plan for the Richfield Redevelopment Project Area ("Modification"). The purpose for the Modification was to continue the goals and objectives set forth in the Redevelopment Plan. Specifically, the Modification expanded the boundaries and included the Subject Property in the Redevelopment Plan project area.

The Modification also included the establishment of the Interchange West and Lyndale Gateway Tax Increment Financing District ("TIF District") and adoption of the related tax increment financing plan ("TIF Plan") to serve as a funding source for implementing the Modification. The Modification, TIF District and TIF Plan went through the regular steps of approval of a redevelopment

project. They were first reviewed by the HRA. The HRA staff recommended adoption of the Modification, TIF District and TIF Plan and the HRA board adopted the same on May 17, 1999.

The Modification, TIF District and TIF Plan then went to the Planning Commission for review. Planning Commission staff recommended adoption finding that the Modification, TIF District and TIF Plan conformed to the general plans for development and redevelopment of the City as a whole. The Planning Commission followed its staff recommendation and adopted the same on May 25, 1999.

The City held a public hearing regarding the adoption Modification, TIF District and TIF Plan. On June 14, 1999, City staff reviewed the Modification, TIF District and TIF Plan and recommended adopting the Modification and TIF Plan and establishment of the TIF District. After the public hearing, the City Council approved the Modification, TIF Plan and TIF District by resolution.

The stated public purpose for the Modification referred to the public purpose in the Redevelopment Plan which was in part to prevent the emergence of blight.

The TIF Plan and the City Council Resolution included appropriate findings, as required by law, for a redevelopment TIF district, including the following: "An inspection of the buildings located within the Interchange West and Lyndale Gateway Tax Increment Financing District finds that more than 50 percent of the buildings are structurally substandard as defined in the TIF Act." The TIF Plan included "facts and reasons" that supported each of the findings in the TIF Plan.

The above findings were based on a report prepared by an architectural planning firm, YHR Partners, entitled Report of Procedures Used and Results Obtained for Determining Tax Increment Financing District Eligibility of Proposed Interchange West Redevelopment District ("YHR Report"). YHR evaluated all of the residential properties. Tom Goodoien ("Goodoien"), who conducted building analysis for establishment of redevelopment projects and TIF Districts for the MCDA for over thirty-five years, prepared a similar report for all of the commercial properties in the TIF District ("Goodoien Report"). The YHR Report dated November 5, 1998 incorporated the Goodoien Report and detailed the procedures used and conclusions reached by YHR and Goodoien in surveying all of the parcels in the proposed TIF District. Walser did not object to the Modification of the Redevelopment Plan or to the formation of the TIF District or to the proposed use of tax increment financing in 1999. At that time the Subject Property was not going to be taken. It was not until the project changed and the Walser property was identified to be taken that Walser raised objections to the TIF district formation. The Walser's readily admit that the TIF challenge in the companion lawsuit is merely a defense to the condemnation action herein.

## CSM REDEVELOPMENT PROJECT

The adoption of the Modification, TIF Plan and TIF District were in response to a redevelopment project proposed by CSM ("CSM Project"). The CSM Project anticipated construction of a hotel with retail, office and housing components on or near the Subject Property. In July of 1999, however, CSM lost the hotel anchor for the

CSM Project and eventually abandoned the CSM Project in its entirety.

**BEST BUY REDEVELOPMENT PROJECT**

The HRA later commenced negotiations with Best Buy and eventually reached an agreement for a redevelopment project that included the Subject Property as an integral part of the plans. The negotiations culminated in the execution of a Contract for Private Development between the HRA and Best Buy dated March 28, 2000 ("Redevelopment Contract").

Under the Redevelopment Contract, Best Buy commits to the construction of the "Minimum Improvements," defined as a corporate office facility of 1.5 million square feet and related improvements in accordance with its conceptual plan. This obligation of Best Buy is conditioned on acquisition of all the property needed for the Project ("Development Property") by February 1, 2001, commencement of construction in April, 2001, and substantial completion of construction by October, 2002. The parties agree that the Development Property will have a "minimum market value" for tax purposes as of January 2, 2003 of least 148 million dollars. Best Buy agrees to pay property taxes based on this market value of the completed project.

In the Redevelopment Contract the HRA agrees to provide substantial public assistance in furtherance of the redevelopment. The HRA also agrees to provide for construction of certain public improvements, including improvement of the Penn Avenue Bridge and 76th Street and others. The developer, Best Buy, represents that it would not undertake the proposed development but for the tax

increment financing assistance being provided by the HRA.

## INITIATION OF CONDEMNATION PROCEEDINGS

Best Buy has executed purchase agreements for all of the properties necessary for the Project except the Walser porperties [sic]. The HRA authorized use of eminent domain to acquire the Subject Property using Quick Take.

## DETERMINATION OF ADEQUACY OF THE ENVIRONMENTAL IMPACT STATEMENT ("EIS") AND AMENDMENTS TO THE COMPREHENSIVE PLAN AND ZONING ORDINANCE

On December 11, 2000, the City Council approved the adequacy of the EIS and modified the comprehensive plan and zoning ordinance change the northern portion of the Interchange West area from Single Family Housing and Neighborhood Commercial to Regional Commercial/Office.

## ARGUMENT

### I. THE SCOPE OF JUDICIAL REVIEW OF THE HRA'S DECISION TO ACQUIRE THE SUBJECT PROPERTY USING EMINENT DOMAIN AS VERY LIMITED

It is well settled in Minnesota that great weight is to be given a condemning authority's legislative decision to acquire property using eminent domain and that, consequently, the court's scope of review of that decision is very narrow. *Matter of MCDA*, 582 N.W.2d 596, 598 (Minn.App. 1998). In a condemnation proceeding, the court's review is limited to whether the taking serves a public purpose and

is necessary. *Id.* The Court is precluded from substituting its own judgment for that of the Authority as to what may be necessary and proper to carry out the purpose of the plan. *Housing and Redev. Auth. v. Minneapolis Metropolitan Co.* 259 Minn. 1, 104 N. W. 2d 864, 874 (1960). If any evidence appears in the record to support a finding that the taking will serve a public purpose, the agency decision must be upheld. The Court will overturn an agency decision only if it is manifestly arbitrary and capricious. *Id. See also, Housing & Redev. Auth. v. Froney*, 305 Minn. 450, 234 N. W. 2d 894 (1979); *Housing & Redev. Auth. v. Coleman's Service, Inc.* 281 Minn. 63, 160 N. W. 2d 266 (1968); *Housing & Redev. Auth. v. Greeman*, 255 Minn. 396, 96 N. W. 2d 673 (1959). Thus, great weight and deference must be given to the HRA's decision to acquire the Subject Property by its power of eminent domain.

Likewise, it is understood that under the enabling legislation, the powers of an HRA are limited to those actions necessary to accomplish two objectives: the elimination of blighted areas and the provisions of housing. *See* Minn. Stat. § 469.001-047. In the present case the issue is the use of eminent domain to eliminate blight.

## II. WHETHER THE TAKING OF THE SUBJECT PROPERTY WILL SERVE A PUBLIC PURPOSE.

As early as 1896, the Minnesota Supreme Court recognized that the boundaries of the term "public use" are not static ones – they change and expand with the needs of a changing society. "The term 'public use' is flexible, and cannot be limited to the public use known at the time of the forming of the constitution." *Stewart v. Great N. Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 209 (1896). *Also see,*

*Housing Redev. Auth. v. Greenman, supra.* "The notion of what a public use may be changes with time. Public use expands with the new needs created by the advance of civilization and the modern tendency of people to move into large cities." *State ex rel. Twin City Bldg. & Inv. Co. v. Haughton*, 144 Minn. 1, 176 N. W. 159, 161 (1920). Thus, the term "public purpose" is broadly construed, great deference is paid to a legislative decision that a particular project serves a public purpose, and the Court presumes that public officials are properly performing their duties when they make such a decision. *R. E. Short Co. v. City of Minneapolis*, 269 N. W. 2d 331, 337 (Minn. 1978).

In Resolution No. 771 authorizing the HRA's use of eminent domain to acquire the Subject Property, the HRA found that it was necessary to acquire the Subject Property in order to "deal with properties that are structurally substandard and to eliminate and prevent the development or spread of conditions of blight found to exist by the City and HRA." In addition, the Petition alleges that it is necessary and for a public purpose to acquire the Subject Property to implement the Redevelopment Plan, as modified by the Modification and consistent with the findings in HRA Resolution No. 771. Thus, the HRA, by Resolution No. 771 and the Petition, has made a prima facie showing that the acquisition of the Subject Property is necessary for a public purpose.

The HRA is seeking to condemn the Subject Property pursuant to the power granted it in *Minn. Stat.* 469.012, Subd. 1(6), which allows it to:

> Within its area of operation to acquire real or personal property or any interest therein by gifts, grant, purchase, exchange, lease, transfer, bequest, devise, or otherwise, and by the exercise of

> the power of eminent domain, in the manner provided by chapter 117, to acquire real property which it may deem necessary for its purposes under these sections, after the adoption by it of a resolution declaring that the acquisition of the real property is necessary to eliminate one or more of the conditions found to exist in the resolution adopted pursuant to section 469.003 or to provide decent, safe, and sanitary housing for persons of low and moderate income, or is necessary to carry out a redevelopment project. Real property needed or convenient for a project may be acquired by the authority for the project by condemnation pursuant to this section. . . .

The Subject Property is to be acquired for the purposes of carrying out a "redevelopment project" as defined at Minn. Stat. §469.002 subd. 14:

> Subd. 14. "Redevelopment project" shall mean any work or undertaking:
>
> (1) to acquire blighted areas and other real property for the purpose of removing, preventing, or reducing blight, blighting factors, or the causes of blight;
>
> (2) to clear any areas acquired and install, construct or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan;
>
> (3) to sell or lease land so acquired for uses in accordance with the redevelopment plan;
>
> (4) to prepare a redevelopment plan, and to incur initiation, planning, survey and other administrative costs of a redevelopment project, and to prepare technical and financial plans and

arrangements for buildings, structures, and improvements and all other work in connection therewith; or

(5) to conduct an urban renewal project. The term "urban renewal project" may include undertakings and activities for the elimination or for the prevention of the development or spread of slums or blighted or deteriorating areas and may involve any work or undertaking for that purpose constituting a redevelopment project or any rehabilitation or conservation work. For this purpose, "rehabilitation or conservation work" may include (i) carrying out plans for a program of voluntary or compulsory repair and rehabilitation of buildings or other improvements; (ii) acquisition of real property and demolition, removal, or rehabilitation of buildings and improvements thereon where necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare, or to otherwise remove or prevent the spread of blight or deterioration, to promote historic and architectural preservation, or to provide land for needed public facilities; (iii) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out the objectives of the urban renewal project; (iv) the disposition, for uses in accordance with the objectives of the urban renewal project, of any property or part thereof acquired in the area of the project; provided that the disposition shall be in the manner prescribed in sections 469.001 to 469.047 for the disposition of property in a redevelopment project area; (v) relocation within or outside the project area of structures that will be restored and

> maintained for architectural or historic purposes; (vi) restoration of acquired properties of historic or architectural value; and (vii) construction of foundations and platforms necessary for the provision of air rights sites.
>
> The term "redevelopment project" also means a redevelopment project initiated as then provided by law and approved by the governing body of the city prior to July 1, 1951, as prescribed by Minnesota Statutes

In the Redevelopment Plan and Modification adopted by resolutions on June 14, 1993 and June 14, 1999, respectively, based on staff recommendations, the HRA and City found that redevelopment of the Project area is necessary to prevent "the emergence of blight and the occurrence of conditions requiring redevelopment" and that HRA had determined that there were "blighted areas" that "include buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors are detrimental to the safety, health, morals or welfare of the City." The stated public purpose of the Redevelopment Plan and Modification is that:

> the HRA has found that public interest requires the replanning and rehabilitation of residential and commercial neighborhoods across the city to remedy conditions of underutilized land, to correct numerous traffic and pedestrian hazards, to improve substandard and unsafe housing units, to increase the property tax base, to increase employment, and to encourage the expansion of private enterprise.

Both the Redevelopment Plan and the Modification went through extensive HRA staff, HRA Board, Planning Commission staff, Planning Commission, City staff and City Council review and public hearings prior to adoption.

With respect to the HRA and City's references to "blighted areas," Minn. Stat. § 469.002, Subd. 11 defines "blighted area" as:

> Subd. 11. "Blighted area" means any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage or deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

The staff reports and plan documents justify the findings by the HRA and City that the area to be redeveloped is or contains "deteriorated" or "blighted" areas, and that the taking serves a public purpose. Extensive staff and HRA, Planning Commission and City Council review and public hearings were conducted on the Redevelopment Plan and Modification prior to adoption.

In the fall of 1998, the HRA and City commissioned investigations of all of the residential and commercial properties in the proposed Interchange West TIF District to ascertain the condition of properties. These investigations were conducted by YHR Partners (an experienced architectural and planning firm) and Tom Goodoien (an experienced property inspection specialist) and served as the basis for the findings in the TIF Plan and corresponding resolutions that over ninety-percent of those properties

were found to be structurally substandard and in need of renovation or clearance.

In the Goodoien Report, Goodoien specifically made "blight" findings, including as an example, that:

> the proposed project area is environmentally blighted with many properties exposed to hazardous traffic patterns, merging and jockeying vehicles on narrow streets, the existence of diverter barriers and lacking adequate parking facilities (resulting in cars parked on sidewalks) all impeding the smooth flow of traffic in an area lacking adequate infrastructure. Poor interior traffic patterns are addressed inappropriately by using diverter crash walls in main arterial streets, which disrupts and impedes the flow of traffic and prohibits normal snow removal. Many commercial uses are too intense with trucks unloading from the street due to inadequate off street parking causing hazardous conditions to pedestrians, and insufficient space to maneuver trucks.

Goodoien determined that "unsafe, obsolete, faulty design, or any combination of these or other factors of the buildings, that are determined to be detrimental to the safety, health, morals, or welfare of the community, essentially conclude the subject properties are blighted and structurally substandard."

Bruce Palmborg ("Palmborg"), the City's Director of Community Development, testified that he personally observed blighting conditions in the Project area. As an example, Palmborg explained that incompatible land uses such as the proximity of auto dealerships to residential areas constituted blighting conditions. Palmborg testified

that the City has received repeated complaints from neighbors in the past of excessive noise (from bullhorns calling salesperson) spilling from the dealerships into the residential neighborhoods as well as traffic safety concerns caused by test driving of cars in the residential areas. Samantha Orduno ("Orduno"), City Manager, testified that in her opinion, many of the homes in the Project area were blighted. Orduno testified that she had seen the interiors of many of the homes in the Project area that that [sic] a large percentage of them were in very poor physical condition. The Court finds that Resolution No. 771, the Modification, the Redevelopment Plan, all of the staff reports relating to the Modification and Redevelopment Plan, and the experience and knowledge of staff, council and board members supported the findings that conditions of blight existed in the Project area.

The Court has some serious concerns about the adequacy of the YHR report. However, this is not a *de novo* issue for the Court to decide. The Court finds the City and the HRA reasonably relied in its staff and consultants. The Court does not find the action of the City and HRA to be arbitrary or capricious.

Walser argues that the taking is speculative and that speculative purposes will not support a finding of necessity. Walser alleges that the HRA is in the untenable position of not knowing whether this project will proceed. In the Development Agreement between the HRA and Best Buy, Best Buy retains contingencies that permit them to "walk away" from the project.

In order to satisfy the public necessity requirement, the HRA need only show that the taking is reasonably

necessary or convenient. *County of Blue Earth v. Stauffenberg*, 264 N.W.2d 647 (Minn. 1978); *Metroplitan [sic] Sewer Bd. v. Thiss*, 294 Minn. 228, 200 N.W.2d 396 (1972). A showing of absolute necessity is not required. *Id.*

Walser's argument on this issue is that the Project is too speculative. In the recent case of *Matter of MCDA*, 582 N.W.2d 596 (Minn.App.) the court held that contract contingencies, such as the approvals and permits remaining for this Project, are normal contingencies for a major redevelopment project.

### A. The HRA Is Not Required to Attack Blight on a Parcel by Parcel Basis.

Walser has claimed that some of the properties located within the Modification and TIF District were improperly classified as structurally substandard and therefore, it was arbitrary and capricious for the HRA to include those properties within the Project area. The Minnesota Supreme Court has repeatedly held that it is not necessary for an agency to attack blight on a parcel by parcel basis. The HRA need not show that the Subject Property itself is blighted. The leading case in Minnesota on this issue is *Housing & Redev. Auth. v. Minneapolis Metropolitan Co.*, 259 Minn. 1, 104 N. W. 2d 864 (1960). The Court, citing the landmark United States Supreme Court decision in *Berman v. Parker*, 348 U.S. 26 (1954), said:

> *the Authority is permitted to attack the problem of blighted parts of a community on an area rather than on a structure-by-structure basis* There, as here, the particular use to be made of the land in the project area was determined with regard to the particular needs of the community.

> Those charged with making the determination decided that if the area was to be restored to a use which would be productive to the community as a whole the entire area needed redesigning.

(emphasis added) *Minneapolis Metropolitan Co.*, at 875. This decision was reiterated by the Court in *Housing & Redev. Auth. v. Schapiro*, 297 Minn. 103, 210 N. W. 2d 211 (1973). Broad discretion is given to an agency to develop a plan to combat blight or deteriorated areas and to carry out redevelopment projects. Even if it were true that a certain property in the Project area is not itself blighted, the HRA is permitted to acquire it as a means of combating blight in the area in which it is located. This Court finds that a decision to include certain property within the Modification, TIF District and TIF Plan and to acquire it through the use of eminent domain cannot be disturbed without a showing of manifest arbitrariness.

**B. Whether the HRA's Decision to Convey the Subject Property to a Private Party for Redevelopment Destroys the Public Purpose for the Taking and for the Project.**

Walser argues that the HRA's plan to convey the Subject Property to Best Buy for redevelopment somehow taints the public purpose. The Minnesota Supreme Court has held that a sale of property, acquired through the use of eminent domain, to a private party pursuant to a redevelopment plan does not destroy the public purpose for the taking. *Housing & Redev. Auth. v. Froney, supra; Housing & Redev. Auth. v. Schapiro, supra; Housing & Redev. Auth. v. Coleman's Service Area., supra; Asch v.*

*Housing & Redev. Auth.*, 256 Minn. 146, 97 N. W. 2d 656 (1956); *Housing & Redev. Auth. v. Greenman, supra.*

In *Greenman*, the landowner challenged a proposal by the St. Paul HRA to convey the acquired property to a private party. After extensive review of both federal and state court decisions discussing the issue, the Court held:

> when slum areas have been reclaimed and redevelopment achieved, the public purpose has been fully accomplished. The fact that the act does not thereafter insure a continued use for public purpose does not in any way affect the purpose of the act or render the taking of the property a taking for a use or purpose which is not public.

*Id* at 681. Similarly, in *Matter of MCDA*, 582 N.W.2d 596, 599 (Minn. Ct. App. 1998), the Minnesota Court of Appeals held that the definition of public use includes a condemning authority's acquisition of private property for development by a different private entity. The *Matter of MCDA* court also held that "condemnation efforts undertaken to enhance deteriorating urban areas and to create jobs satisfy the public purpose aspect of a condemnation proceeding." *Id.*

Walser cites *Port Authority of City of St. Paul v. Fisher*, 269 Minn. 276, 288, 132 N.W.2d 183, 192 (1964) for the proposition that "if the primary object is to promote some private end, the expenditure is illegal, even though it may incidentally also serve some public purpose." *Fisher* involved a challenge to revenue bond financing under the port authority statute (Minn. Stat. Chapter 458). The use of the bonds was actually approved by the Supreme Court in an opinion subsequent to the decision cited. *See Port authority of City of St. Paul v. Fisher*, 145 N.W.2d 560

(1966). The proposed project in *Fisher* included public financing of the construction of an industrial building to be leased for thirty years to a private manufacturing corporation. The Minnesota Supreme Court upheld the bonds in question, citing in part to *Asch v. Housing and Redevelopment Authority*, 256 Minn. 146, 97 N.W.2d 656 (1959) which upheld the reclamation of blighted lands and sale thereof to private persons for commercial development. The *Fisher* court also reiterated its "refusal to overrule a legislative finding that such activity constituted a public benefit in the absence of evidence that the legislative determination was arbitrary and unreasonable. *Fisher*, 145 N.W.2d at 569.

The case of *Minn. Energy & Economic Deve. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984) has also addressed this issue. In *Printy*, the Minnesota Supreme Court upheld the expenditure of public funds for pollution control projects at private facilities. The *Printy* court held that such expenditure of funds that would create jobs and improve the local tax base was a constitutional expenditure of public funds for a public purpose despite the fact that private businesses would receive a large benefit from the program. *Id.* at 342.

Similarly, in *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978), the Minnesota Supreme Court upheld the use of public funds for a development that included a private hotel and a pubic [sic] parking ramp. Instead of just viewing the parking ramp in a vacuum to determine whether the project served primarily a public or private interest, the *Short* court considered that the public benefits resulting from the 26 million dollar hotel included 1.2 million dollars in property taxes, an increased tax base, seven hundred new jobs, increased

liquor and hotel taxes and the revitalization of Minneapolis as a convention and tourist attraction. *Id.* at 340. The *Short* court also held that the scope of review of government decision making is extremely narrow and a reviewing court should overrule a legislative determination that a particular expenditure is made for a public purpose only if that determination is manifestly arbitrary and capricious. *Id.* at 337. Citing to the *Fisher* case, the *Short* court held that "we pay great deference to the initial legislative determination that a particular project serves a public purpose. *Id.* Finally, the *Short* court also considered this type of expenditure of funds in the condemnation context. "We have gone so far as to approve the condemnation of land by a public authority and its later sale or lease to private developers." *Id.* at 339 citing *Housing and Redevelopment Authority of St. Paul v. Greenman*, 255 Minn. 396, 96 N.W.2d 673 (1959).

Here, great deference must be paid to the HRA's determination that the taking of the Subject Property is necessary for a public purpose. Thus, the HRA's plans for conveyance of the Subject Property, together with the other properties acquired for the Project, to Best Buy in order to accomplish the redevelopment objectives, does not taint the public purpose for the taking. In fact, this is the normal method by which redevelopment occurs. The public purpose remains in the clearing and redevelopment of deteriorated areas, as well as numerous other public benefits which the Project will achieve.

### C. Whether this Taking is Authorized under Minn. Stat. § 469.012, Subd. 1(6), Based on the Resolution That Created the HRA and the Condemnation Petition.

Pursuant to Minn. Stat. § 469.012, Subd. 1(6) the HRA may:

> . . . Acquire real property which it may deem necessary for its purposes, after the adoption by it of a resolution declaring that the acquisition of the real property is necessary to eliminate one or more the conditions found to exist in the resolution adopted pursuant to section 469.003 . . .

Minn. Stat. § 469.003 states that the HRA may not transact any business or exercise any powers until it has "by resolution, find that in that city (1) substandard, slum, or blighted areas exist which cannot be redeveloped without government assistance." There is no dispute that the HRA was created in 1974 in accordance with Minn. Stat. § 469.003 by adoption of Resolution No. 5238. Thus, when the HRA adopted Resolution No. 771, which included a finding that it was necessary to acquire the Subject Property to eliminate blight and structurally substandard buildings, it authorized a taking whose purpose was to eliminate the conditions found to exist in Resolution No. 5238. Accordingly, pursuant to the express language of Minn. Stat. § 469.012, Subd. 1(6), the Petition should be granted because the HRA was duly created pursuant to Minn. Stat. § 469.003 by virtue of Resolution No. 5238 and the HRA adopted a resolution authorizing acquisition of the Subject Property in order to eliminate conditions that were specified in Resolution No. 5238.

## III. WHETHER THE HRA IS ENTITLED TO AN ORDER APPROVING THE USE OF QUICK TAKE.

*Minn. Stat.* § 117.042 provides in relevant part:

> "Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess by notice served by certified mail and before taking title and possession shall pay to the owner or deposit with the court an amount equal to petitioner's approved appraisal of value . . . "

The HRA has satisfied all of the requirements of *Minn. Stat.* § 117.042. First, based on its staff report, the HRA has found that it needs to acquire title and possession to the Subject Property prior to the filing of an award by the court appointed commissioners. The HRA has indicated that the reason is that the HRA must provide complete site control to Best Buy by February 1, 2001 to enable Best Buy to commence construction by April, 2001 pursuant to the Redevelopment Contract. The HRA has also adopted a resolution approving the appraised values of the Subject Property. The HRA has also complied with *Minn. Stat.* § 117.042 by providing the requisite notice of the intent to possess.

Walser did not submit any evidence that rebutted the HRA's need to have title to and possession of the Subject Property by February 1, 2001. Instead, Walser submitted extensive testimony at trial that it had taken serious efforts to prepare new locations for its dealerships. Walser witnesses testified that for the Buick-Isuzu dealership,

Walser had closed on the purchase of the Lincoln Del site at the southwest quadrant of the I-494 and 35W interchange. Walser's architect testified that construction work had already commenced and that pilings were being driven during trial. Walser also identified site for relocation of the BMW Motorworks dealership. Walser's evidence suggested that it will have trouble from a timing standpoint to actually relocate the dealerships before Best Buy is scheduled to commence construction in April, 2001.

In this case, the HRA contends that it must take title and possession of the property by February 1, 2001 in order to convey the land to Best Buy by that date. However, no evidence was submitted by the HRA as to Best Buy's actual timetable or construction plans. Moreover, the evidence at the hearing was that the current residents and occupants may remain at least through April 30, 2001, and probably through the end of the school year.

It is apparent that the HRA itself had no need for a quick take, other than to accommodate Best Buy's wishes, and the evidence showed that even Best Buy did not contemplate needing the property until at least April 30, 2001, and probably not until the end of the school year (say, June 15, 2001).

Because the HRA has met its burden of satisfying all the statutory elements, it is entitled to an order approving transfer of the Subject Property pursuant to *Minn. Stat.* § 117.042. While the Court intends to grant title of the land to the HRA, it also intends to allow the Walsers to remain on the property pursuant to a lease (or some other suitable arrangement) until June 15, 2001. The Court is willing to discuss with the parties the actual mechanism to accomplish this goal.

## IV. WHETHER THE CONDEMNATION IS CONSISTENT WITH THE MINNESOTA ENVIRONMENTAL POLICY ACT.

### A. The Condemnation May Proceed Because the City Council Has Determined The EIS Is Adequate.

The Minnesota Environmental Policy Act ("MEPA") provides that where an EIS is required for a governmental action, as it undisputedly is here, "a project may not be started" until the EIS has been determined adequate or a variance has been granted. Minn. Stat. § 116D.04, Subd. 2b. The HRA argues that "project" isn't "started" until construction begins, and thus, the only thing the HRA has been prohibited from doing is breaking ground on the proposed Best Buy campus.

The rules promulgated under MEPA define "project" as "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly." Minn. R. 4410.0200, subp. 65. A "project" is not construction. A "project" is governmental action – be it an approval, the execution of a contract, the issuance of a permit, or the commencement of a condemnation action – that, directly or indirectly, will result in physical manipulation of the environment.

MEPA and the rules which have been adopted to implement it require the preparation of an Environmental Impact Statement (EIS) for certain proposals. The Best Buy project in Richfield required the preparation of an EIS, and an EIS was prepared. That EIS was determined to be adequate by City Council at its December 11, 2000 meeting.

Walser relies on a provision of MEPA, Minn. Stat. § 116D.04, subd. 2b. That subdivision provides:

> Subd.2b. If an environmental assessment worksheet or an environmental impact statement is required for a governmental action under subdivision 2a, a project may not be started and final governmental decision may not be made to grant a permit, approve a project, or begin a project, until: (1) a petition for an environmental assessment worksheet is dismissed;
>
> (2) a negative declaration has been issued on the need for an environmental impact statement;
>
> (3) *the environmental impact statement has been determined adequate*; or
>
> (4) a variance has been granted from making an environmental impact statement by the environmental quality board.

(Emphasis added).

Similarly, rules adopted by the EQB prohibit certain decisions before the EIS has been determined adequate:

> Subpart 1. **Prohibitions.** If an EAW or EIS is required for a governmental action under parts 4410.0200 to 4410.7500, or if a petition for an EAW is filed under part 4410.1100, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:
>
> A. a petition for an EAW is dismissed;
>
> B. a negative declaration on the need for an EIS is issued;

C. *an EIS is determined adequate;* or

D. a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8.

Subp. 2. **Public projects, prohibitions.** If a project subject to review under parts 4410.0200 to 4410.7500 is proposed to be carried out or sponsored by a governmental unit, the governmental unit shall not take any action with respect to the project, including the acquisition of property, if the action will prejudice the ultimate decision on the project, until a petition has been dismissed, a negative declaration has been issued, *or until the final EIS has been determined adequate* by the RGU or the EQB, unless the project is an emergency under subpart 9 or a variance is granted under subparts 4 to 8. An action prejudices the ultimate decision on a project if it tends to determine subsequent development or to limit alternatives or mitigative measures.

Minn. Rule 4410.3100 (emphasis added).

Now that the final EIS has been determined adequate, there is no reason that the condemnation action should not proceed and the HRA acquire the land. This Court finds Walser's MEPA argument is moot. The final EIS has been determined adequate; there is no reason the property acquisition may not proceed.

### B. There Has Been No Violation of Minn. Rule 4410.3100, subpart 1.

Walser has argued that the condemnation proceedings should not have been initiated before the EIS was determined adequate. This Court finds that position is based on

a misreading of MEPA and the rules. Walser relies on a part of the rules providing that a "project may not be started" before the EIS adequacy determination. A "project" is not "started" until construction begins. This is clear from the definition of "project":

> **Project.** "Project" means a governmental action, the results of which would cause *physical manipulation of the environment*, directly or indirectly. The determination of whether a project requires environmental documents shall be made *by reference to the physical activity to be undertaken* and not to the governmental process of approving the project.

Minn. Rule 4410.0200, subp. 65 (emphasis added).

"Project" is defined in terms of "physical activity" and a "physical manipulation of the environment" and not in terms of governmental approvals. A project does not "begin" and is not "started" until construction begins. The condemnation of property is not the start of a project under this definition.

Thus, for subpart 1 to be applicable, Walser would have to rely on the part of that subpart providing that "a final governmental decision may not be made to grant a permit, approve a project or begin a project." Minn. Rule 4410.3100, subp. 1. Under the definitions of "permit" and "project," condemnation does not amount to the granting of a "permit" or the "approval" of a project. Minn. Rule 4410.0200, subp. 58, 65.

Moreover, the rule prohibits only "final governmental decisions." Initiating the condemnation process does not amount to a "final" governmental decision. A condemnation action is not "final" until title to property is acquired

and compensation is fixed. Minn. Stat. §§ 117.042, 117.18. This reading of subpart 1 was adopted by the Court in *County of Dakota (S.P. 46-06) v. County of Lakeville*, 559 N.W. 2d 716, 720 (Minn. Ct. App. 1997). In that case, the Court noted:

> Appellants finally argue that the Board's decision to condemn their property was irrational because it was made before the environmental review process was complete. We disagree. Neither the MEPA nor the eminent domain statutes prohibits a county board from initiating condemnation proceedings to secure right-of-way for a project before the environmental review process for the project is complete. *See* Minn. Stat. §§ 116D.01-.11 (1994) (MEPA); Minn. Stat. § 117.011-.57 (1994 & Supp. 1995) (eminent domain). The MEPA only provides that before a negative declaration is made on the need for an EIS, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project.
>
> Minn. Stat. § 116D.04, subd. 2b. . . .

There has been no "final" governmental decision in the condemnation action, and beginning condemnation proceedings did not violate 4410.3100, subp. 1.

### C. Attacks based on MEPA May Not Be Made in this Proceeding.

Violations of MEPA are subject to judicial review under MEPA itself. Walser could have sought relief under MEPA, but did not do so. Moreover, there is no authority for determining that a condemnation is not "authorized by law" because of purported violations of MEPA. *County of*

*Dakota v. City of Lakeville*, 559 N.W.2d 716, 720 (Minn. Ct. App. 1997).

Claimed violations of MEPA are not defense to a condemnation action. It is well established that judicial review of condemnation proceedings is "very narrow." *Matter of MCDA*, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998). Review has been limited to two issues: whether the taking serves a public purpose and is necessary. *Id.* Walser cites a 1914 case for the proposition that the Court must determine whether the taking is consistent with state law. The scope of that case was explained in *Matter of MCDA*. The *MCDA* Court read the *Minnesota Canal* case to mean that a condemning authority cannot undertake a public project if the project itself is not permitted by law. That is not the case here (i.e. there is nothing unlawful about an office complex).

## CONCLUSION

The HRA has demonstrated that it has properly found a public use and purpose and necessity for the taking of the Subject Property which will further the goals and objectives of the Redevelopment Project. The HRA has also demonstrated that it has met the requirements for the use of the statutory quick take procedure. The HRA's petition is granted and the HRA is authorized by law to acquire the real estate in its petition herein, as amended, under the procedures specified in Minn. Stat. Chapter 117 (1998) and other law. The HRA has complied with all the legal requirements for obtaining title and possession pursuant to Minn. Stat. § 117.042 (1998) subject to Waslers' right to remain on the property pursuant to a lease until June 15, 2001.

STATE OF MINNESOTA

IN SUPREME COURT

C4-01-694

Walser Auto Sales, Inc., et al.,

Respondents,

vs.

City of Richfield, et al., petitioners,

Appellants.

ORDER

Based upon all the files, records and proceedings herein, and upon an evenly divided court,

IT IS HEREBY ORDERED that the decision of the court of appeals filed November 13, 2001, be, and the same is, affirmed without opinion.

Dated: May 23, 2002

BY THE COURT:

/s/ Kathleen A. Blatz
Kathleen A. Blatz
Chief Justice

LANCASTER, J., took no part in the consideration or decision of this case.

**STATE OF MINNESOTA**

**SUPREME COURT**
**JUDGMENT**

The Housing and Redevelopment
Authority in and for the City of Richfield,

Respondent,

vs.

Walser Auto Sales Inc., et al., petitioners,

Appellants,

R.J. Walser, et al., petitioners,

Appellants.

**C8-01-309**

*Appellate Court Case Number*
CD 2604

*Trial Court Case Number*

*Pursuant to an order of Court hereto duly made and entered in this cause it is determined and adjudged that the orders and judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Hennepin be and the same hereby are affirmed in accordance with opinion*

*and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.*

*Dated and signed:* FOR THE COURT May 31, 2002
*Dated*

*Attest:* Frederick K. Grittner
*Clerk of the Appellate Courts*

*By:* /s/ [Illegible]
*Assistant Clerk*

**YHR**
**PARTNERS**
**FACILITIES GROUP**

**3989 CENTRAL AVENUE NE SUITE 595 MINNEAPOLIS, MINNESOTA 55421 PH: 612-788-5319 FX: 612-788-5324**
**www.yhr.com**

July 10, 1998

John Melin
Community Development Manager
City of Richfield
6700 Portland Ave
Richfield, MN 55423-2599

RE: Property Evaluations for Richfield Redevelopment

Dear Mr. Melin:

We received you [sic] letter dated 6/24/98 with the accompanying information regarding your needs on this project. Thank you for the opportunity to propose consulting services which can meet those needs.

As we discussed on the phone last week, we met yesterday with Sid Inman of Ehlers. We reviewed with him our assessment of the situation and suggested an approach to satisfying your goals for this project to qualify for TIF under the "Redevelopment District" classification.

Sid suggested we document our discussions in preparation for a meeting with all of us. The purpose of that meeting will be to agree upon a process and a time schedule, define the responsibilities we would assume as your consultant and agree upon what actions will be needed from the city. Subsequently we will provide you with a proposal for our services.

After reviewing the TIF criteria, we visited the site. We observed that the buildings are generally in good condition and can't, by any means, be classified as "run down". We concluded that using only a standard condition assessment methodology may not produce the desired results. For this reason, we suggest an alternative approach which analyzes buildings under a "life cycle" analysis procedure. The major principals of this approach are as follows:

> This area of the city is generally comprised of three building types including single family residences and duplexes, multi-unit apartment buildings and commercial buildings. The "life cycle" analysis procedure is based on an evaluation of a specific group of building components for each building type.

A cost model for each building type would be developed which would include a list of major building components, the expected life spans of the [sic] those components, costs to replace components at the end of their lifetime and square footage costs to replace the entire building. A typical list of building components includes:

- Site (including parking lots, walks, lawns, plantings, utilities/lighting, signage, drainage and fire department access)
- Structures (including foundations, bearing walls, building skeleton and floor and roof structures)
- Building Envelope (including roofs, exterior walls, windows, exterior doors and soffits, etc.)
- Interiors (including ceilings, flooring, wall finishes, interior doors, stair/ramps, elevators, and toilet rooms)

- Mechanical Systems (including boilers, furnaces, air conditioners, air handling units, distribution systems, radiation systems, convectors, control systems, plumbing systems, plumbing fixtures, etc.)
- Electrical Systems (including main services, distribution panels, outlets, illumination, communication systems, electric heating systems, equipment connections and generators)
- Fire Protection (sprinkler systems)
- Emergency Systems (annunciation, fire alarm systems)

Each building in the district would be evaluated based on the age and condition of individual components. All components would be assigned a replacement cost based upon the amount of their expected life-cycle that is "used-up". For example, a commercial property has a roof which is expected to last 20 years. The property evaluator determines, based on physical condition, that the roof can be expected to last 10 more years. Therefore the roof is determined to be 50% "used-up". Based on the cost model for commercial buildings the replacement value of the roof is 5% of the overall cost to replace the building. The replacement cost for the building (again based on the cost model) is $100.00/square foot. It is reasonable to assume that the 50% of the replacement value of the roof can be assigned to the current defects of the building.

Given a building with 10,000 square feet:

> 5 (50% – roof lifetime used-up) x .05 (5% – roof value) x 10,000 S.F. (building area) x $100.00/S.F. (building replacement cost) =

$25,000.00 (current replacement cost for the building roof)

This $25,000.00 can also be regarded as a building deficiency or defect contributing to an overall "structurally substandard" designation. A similar calculation would be included for each building component to generate an overall cost of current defects.

A standard condition assessment method would identify only those items that are in immediate need of repair or replacement. The "life-cycle" method of analysis includes these items as being 100% "used-up". Also, we would incorporate obvious code compliance issues and energy efficiency deficiencies in the mix.

A determination also needs to be made regarding the amount of parcels occupied by buildings, streets, utilities and other improvements. While the city probably has much of this information on file, we would verify parcels when necessary and conduct field measurements to supplement the city's information.

We trust this information sets the stage for our meeting. Sid indicated he would coordinate the time and place of the meeting.

We look forward to helping you and the City of Richfield achieved [sic] the desired TIF designation for your redevelopment efforts.

Sincerely,

YHR Partners

By /s/ W. Dale Ruff

W. Dale Ruff, AIA
Principal

C: Sid Inman, Ehlers and Associates, Inc.

AGENDA SECTION: Resolutions
AGENDA ITEM # 6 5
REPORT # ~~45~~ 44

Richfield

STAFF REPORT
HOUSING AND REDEVELOPMENT AUTHORITY MEETING
JULY 17, 2000

| | |
|---|---|
| REPORT PREPARED BY: | JOHN STARK, COMMUNITY DEVELOPMENT MANAGER<br>*Name, Title* |
| REPORT PRESENTER: | BRUCE PALMBORG, COMMUNITY DEVELOPMENT DIRECTOR<br>*Name, Title* |
| DEPARTMENT DIRECTOR REVIEW: ☑ | /s/ BP<br>*Signature* |
| REVIEWED BY EXECUTIVE DIRECTOR: ☑ | /s/ [Illegible] |

**ITEM FOR HRA CONSIDERATION:**

Consideration of a resolution authorizing eminent domain proceedings to acquire certain real properties within the Interchange West area.

**I. RECOMMENDED ACTION:**

By Motion: Adopt a resolution authorizing eminent domain proceedings to acquire certain real properties within the Interchange West area located at and adjacent to 2100 West 78th Street.

**II. BACKGROUND**

On March 20, 2000, the Richfield Housing and Redevelopment Authority (HRA) adopted, and entered into, a Contract for Private Development (Contract) with Best

Buy for the redevelopment of the Interchange West area. The Contract contemplates the private acquisition of properties by Best Buy wherever possible. Section 3.2 of the Contract, however, allows Best Buy to request that properties be acquired through condemnation. The Contract stipulates that this request can come only after Best Buy has taken reasonable steps to acquire property for which the request is being made.

Best Buy states that they have made diligent efforts to negotiate the purchase of the following parcels of land:

Parcel 1: 2016-2026 W. 78th Street
Parcel 2: 2100 W. 78th Street
Parcel 3: 7701 Newton Avenue South
Parcel 4: 2000 W. 78th Street
Parcel 5: 7701 Penn Avenue South
Parcel 6: 7745 Penn Avenue South

Best Buy reports that an offer for the purchase of these properties was initially made on April 7, 2000 and further efforts to reach a negotiated purchase agreement with the property owner(s) have been unsuccessful. Therefore, they are requesting that the HRA acquire the properties and leasehold interests through the use of eminent domain. The properties for which the request is being made are all owned by either R. J. Walser or Walser Auto Sales, Inc. A complete legal description of the properties under consideration for acquisition through eminent domain can be found in Exhibit A of the attached resolution.

Because these properties are also being acquired in preparation for the eventual widening of I-494, and the need for additional right-of-way which that project requires, HRA staff is making an offer for the purchase of the properties. The HRA offer is independent of the offer made by Best

Buy. The HRA offer is based on the results of two independent appraisals of the real estate and fixtures as well as a review appraisal of the real estate and fixtures. The purpose of the independent HRA offer is to comply with the rules and regulations governing the acquisition of property for right-of-way to be used in a federally funded project.

The resolution to authorize eminent domain, if approved, stipulates that the eminent domain proceedings would not commence for at least 14 days after the HRA offer to purchase the properties is presented.

## III. BASIS OF RECOMMENDATION

### A. POLICY

- The HRA entered into a Contract for Private Development with Best Buy Co., Inc. on March 20, 2000.
- Section 3.2 of the Contract allows Best Buy to request that the HRA acquire those properties, for which Best Buy has been unable to reach a negotiated agreement, through eminent domain.
- Best Buy has submitted a Request for Condemnation for certain properties.
- In their request, Best Buy includes evidence satisfying the conditions required by Section 3.2 of the Contract.

### B. CRITICAL ISSUES

- The timely acquisition of the 'Walser' properties is critical to success of this project.

C. FINANCIAL

- In accordance with the Contract, Best Buy will be responsible for all the HRA costs associated with this eminent domain action.

D. LEGAL

- Legal counsel has reviewed the Request for Condemnation and has found that it satisfies the requirements set forth in Section 3.2 of the Contract.

IV. ALTERNATIVE RECOMMENDATION(S)

- Do not approve the resolution authorizing the use of eminent domain for the acquisition of the identified properties. To approve this at a later date may have an adverse impact on the overall schedule.

V. ATTACHMENTS

- Resolution authorizing eminent domain proceedings to acquire certain real properties
- Property map

VI. PRINCIPAL PARTIES EXPECTED AT MEETING

- A representative of Best Buy, or their developer Opus
- HRA legal counsel Corrine Thomson
- A representative of the property owner(s)

**HRA RESOLUTION NO. 771**

**RESOLUTION OF THE HOUSING AND REDEVELOPMENT AUTHORITY IN AND FOR THE CITY OF RICHFIELD, MINNESOTA**

**AUTHORIZING EMINENT DOMAIN PROCEEDINGS TO ACQUIRE CERTAIN REAL PROPERTIES**

**WHEREAS**, the Housing and Redevelopment Authority in and for the City of Richfield, Minnesota (the "HRA") is a housing and redevelopment authority duly constituted and organized under law, with all of the powers enumerated in Minnesota Statutes, Sections 469.001 to 469.047 (the "Act"); and

**WHEREAS**, the HRA is authorized to develop and carry out redevelopment plans and redevelopment projects, as those terms are respectively defined in Minnesota Statutes, Section 469.002, subdivisions 16 and 14; and

**WHEREAS**, the City of Richfield on June 14, 1993 adopted a redevelopment plan (the "Redevelopment Plan") for the Richfield Redevelopment Project Area (the "Project Area"), and on June 14, 1999 adopted a modification to the Redevelopment Plan and established the Interchange West and Lyndale Gateway Tax Increment Financing District (the "TIF District").

**WHEREAS**, the Plans, as modified, contemplate the acquisition of certain real properties (the "Properties") which are located in the Project Area and which are more particularly described below in this resolution; and

**WHEREAS**, the HRA has entered into a contract for private redevelopment (the "Contract") of land lying within the TIF District portion of the Project Area (including, but not limited to the Properties); and

**WHEREAS**, the Developer under the Contract is not in default of any of its obligations thereunder, and the HRA is satisfied that the Developer has endeavored reasonably, but without success, to negotiate the acquisition of the Properties; and

**WHEREAS**, the Developer has informed the HRA of the status of such efforts and has established, to the satisfaction of the HRA, that there is no substantial likelihood that further negotiations would be productive; and

**WHEREAS**, the Developer has requested that, in accordance with the terms of the contract, the HRA commence eminent domain proceedings, and that such proceedings be undertaken as soon as possible so as to assure that the Properties will be available for development when needed; and

**WHEREAS**, the HRA is satisfied, based upon the information provided, that that [sic] the Developer has complied with the requirements of the Contract concerning such request; and

**WHEREAS**, the HRA has retained qualified independent appraisers to estimate the market value of the Properties and immovable fixtures located on the Properties; and

**WHEREAS**, the HRA has authorized its staff to make an offer to purchase the Properties based on the appraised value of the Properties as approved by staff; and

**WHEREAS**, the HRA wishes to ensure that the owners of the Properties are allowed a reasonable period of time to respond to said offer.

**NOW, THEREFORE, BE IT RESOLVED** by the Housing and Redevelopment Authority in and for the City of Richfield, Minnesota as follows:

1. It is necessary to acquire the Properties as described below in this resolution in order for the HRA to carry out the purposes of the Plans, as modified, and the Act, to deal with properties that are structurally substandard and to eliminate and prevent the development or spread of conditions of blight found to exist by the City and the HRA.

2. Acquisition of the Properties by eminent domain, in the matter provided by Minnesota Statutes, Chapter 117, is deemed to be necessary and for a public purpose and is hereby authorized.

3. The HRA deems it necessary for the reasons set forth in the Plans, as modified, and in order to meet anticipated construction schedules, to proceed without undue delay to commence condemnation of the Properties.

4. The HRA's attorney and staff are authorized to commence and prosecute to completion eminent domain proceedings to acquire fee simple absolute title to the Properties, provided that eminent domain proceedings shall not be commenced until at least 14 days after the HRA's attorney or staff has mailed an offer to purchase the Properties to the fee owners of the Properties. The HRA's attorney and staff are authorized to delay commencement of proceedings beyond said 14-day period if they deem it to be in the HRA's interests or in the interests of facilitating a negotiated settlement of the Properties between the property owners and the developer.

5. The Properties to be acquired are described on the attached Exhibit A.

Adopted by the Housing and Redevelopment Authority in and for the City of Richfield, Minnesota this 17th day of July, 2000.

/s/ Thomas E. Harms
Thomas E. Harms,
Chairperson

ATTEST:

/s/ Michael Sandahl
Mike Sandahl, Secretary

[1] STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

---

The Housing and Redevelopment authority for the City of Richfield, a public body corporate and politic under Minnesota law,
Petitioner,
v.
Walser Auto Sales, Inc., a Minnesota corporation, et al.,
Respondents.

**TRIAL VOLUME I**

File No.: CD 2604

---

The above-entitled matter came duly on for hearing before the Honorable Gary Larson, one of the Judges of the above-named Court on **December 4, 2000**, in Courtroom 1655, at the Hennepin County Government Center, Minneapolis, Minnesota.

**APPEARANCES:**

John M. LeFevre, Jr., Esq., and Joe Y. Yang, Esq., appeared on behalf of Petitioners.

Bruce D. Malkerson, Esq., and Bradley Gunn, Esq., appeared on behalf of Respondents.

Lynne Krenz, Court Reporter.

* * *

[67] Q. (By Mr. Gunn, continuing) Mr. Palmborg, directing your attention to what has been received now as Exhibit 9. I believe you testified that this – that Exhibit 9 outlines the boundaries of the Richfield redevelopment project area; is that correct?

A. That's correct.

Q. And those boundaries were established as of 1993; correct?

A. That's correct.

Q. Is it fair to say that approximately 90 percent of the City is included within the Redevelopment Project Area?

A. Approximately.

Q. The Interchange West area is not included in the project area; is it?

A. Correct.

* * *

[111] Q. (By Mr. Gunn, continuing) It states, "That the third purpose that we were discussing – got it?

A. Yeap, [sic] I do.

Q. "To eliminate and prevent the development or spread are of 'conditions of blight.'"

What I'm trying to get at is, in your opinion, are conditions of blight the same as blight?

A. I guess I would say, yes.

Q. Wouldn't it be true you could drive through any neighborhood in Richfield or Minneapolis or anywhere else and find conditions of blight?

A. Probably.

Q. Didn't the HRA's own consultant, YHR, state that the properties in the project area are generally in good

condition and can't by any means be regarded as run-down?

A. I believe that was said, yes.

* * *

**No. C8-01-309**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

The Housing and Redevelopment Authority in and for the City of Richfield,

*Respondent,*

v.

Walser Auto Sales, Inc. et al.,

*Appellants.*

# APPELLANTS' REPLY BRIEF

Bradley J. Gunn (#132238)
Carolyn V. Wolski (#199874)
LEONARD, STREET AND DEINARD
Professional Association
150 South Fifth Street,
Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

***ATTORNEYS FOR APPELLANTS WALSER AUTO SALES, INC., AND MOTORWERKS, INC.***

John M. LeFevre, Jr. (#61852)
Corrine H. Thomson (#149743)
KENNEDY & GRAVEN, CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 337-9218

***ATTORNEYS FOR RESPONDENT RICHFIELD HRA***

Bruce D. Malkerson (#66862)
MALKERSON, GILLILAND & MARTIN, LLP
901 Marquette Avenue,
Suite 1500
Minneapolis, MN 55402

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West

Telephone: (612) 344-1111
Christopher J. Dietzen
(#22858)
LARKIN, HOFFMAN, DALY
& LINDGREN, LTD.
7900 Xerxes Avenue South,
Suite 1500
Bloomington, MN 55431
Telephone: (952) 835-3800

St. Paul, MN 55103-2044
Telephone: (651) 281-1232

***ATTORNEY FOR AMICUS CURIAE LEAGUE OF MINNESOTA CITIES AND MINNESOTA CHAPTER OF THE NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS***

* * *

**B. <u>The Taking of the Walsers' Property Is Unconstitutional, Because It Was Not "Primarily for a Public Purpose</u>."**

In order for an exercise of the eminent domain power to be valid, it must be for a "public use." U.S. Const. amend. V, as incorporated by amend. XIV; Minn. Const. art. 1, § 13. In appropriate circumstances, a public purpose can result in a transfer of the property to another private owner. Use of eminent domain power by railroads, public utilities, and the like provides benefits to all members of the community. Use of the power to clear slums may also serve a public purpose, if they are in fact slums. *Berman v. Parker*, 348 U.S. 26 (1954). A court faced with these constitutional issues must conduct its own independent examination of this question, as it must do on all constitutional issues. The Minnesota eminent domain statutes require the trial court to review "*all* competent evidence." Minn. Stat. § 117.075 (1997) (emphasis added).

### 1. Best Buy Was the Primary Beneficiary of the Project.

Under Minnesota law, when a taking would take property from one private party in order to convey it to another private party, the condemnor must prove that the "primary" purpose being served is a public one. (App. Br. at 24.) In this case, the undisputed evidence revealed that Best Buy, and *not* the public, is the primary beneficiary of this project. (App. Br. at 26-27.) The HRA does not even address this issue. Rather, it tries to "sweep under the rug" the requirement that the taking must be primarily for a public purpose. As set forth in section III, *infra*, neither the trial court nor the Court of Appeals addressed this issue either.

The HRA argues that there is some private benefit in most all redevelopment projects. (Resp. Br. at 41.) However, that argument is neither responsive nor relevant. The question is who is the *primary* beneficiary of the project, and the HRA does not even argue that the public benefits more than Best Buy. For this reason alone, the HRA's taking must be reversed.

The HRA also argues that a public purpose finding "flows inevitably" from the fact that the trial court found that the HRA properly designated the area as a "redevelopment project." (Resp. Br. at 40-41.) This is absurd. First, the purpose of this appeal is to determine the propriety of the trial court's findings and its view of the applicable law. Second, the Constitution's "public use" requirement "trumps" any possible statutory designation by a municipal body. Third, it is the duty of the courts to determine whether the statutory requirements for any such designation have been met.

### 2. The Alleged Elimination of Blight Was Merely a Pretext to Accommodate Best Buy.

The HRA contends that the public purpose for taking the Walsers' property was to facilitate a redevelopment project or to eliminate blight. These are, on the surface, permissible purposes for an exercise of the power of eminent domain, provided they are supported by the evidence. The question of whether the public purpose requirement has been satisfied, however, is a judicial question. "[I]t is the duty of the courts to intervene for the protection of the property owner whenever it clearly appears that, under the guise of taking his property for a public purpose, it is in fact being taken for an improper purpose." *Port Authority of City of St. Paul v. Groppoli*, 295 Minn. 1, 202 N.W.2d 371, 375 (Minn. 1972) (citation omitted).

The record in this case demonstrates that the HRA's primary – and in truth its *only* – motivation in pursuing this project was to attract and to retain Best Buy's new corporate headquarters. The HRA's allegations of blight never even surfaced until months after the HRA had already entered into a redevelopment agreement that *obligated it* to condemn the Walsers' property at Best Buy's request. (Ex. 22.) Even then, there was no study, no hearings, and no findings on the alleged existence of blight. In effect, the HRA simply declared that: "We're going to condemn the Walsers' property, and since under Minnesota law we may only condemn to eliminate or prevent blight, that's the reason we have to go with."

In cases such as this, where the alleged public purpose for the taking is merely a pretext for advancing a private interest (or some other improper purpose), the courts will

not permit the condemnation to proceed. *See, e.g.*, *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227 (Del. 1987) (proposed taking for parking ramp was unlawful and beyond authority's statutory power where stated reason for taking was pretext for providing expansion space to newspaper City wanted to retain); *Borough of Essex Fells v. Kessler Inst. for Rehabilitation*, 289 N.J. Super. 329, 673 A.2d 856 (N.J. Super. Ct. App. Div. 1995); *Pheasant Ridge Assocs. v. Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (Mass. 1987); *Brannen v. Bulloch County*, 193 Ga. App. 151, 387 S.E.2d 395 (Ga. Ct. App. 1989).

* * *

## III. STANDARD OF REVIEW: THE TRIAL COURT MUST EXERCISE INDEPENDENT JUDGMENT ON THESE QUESTIONS.

The HRA proposes that it has virtually complete and unfettered discretion to take any property it desires regardless of any limits on its authority or the purpose of the taking. Of course, the HRA is not brazen enough to expressly proclaim its entitlement to absolute discretion. The HRA's contention is nevertheless implicit in its arguments relating to the standard of review in this case. More specifically, the HRA argues that its eminent domain decisions must be given nearly complete deference and be upheld unless there is absolutely *no* evidence that could support them. The HRA, however, focuses on broad statements made in appellate decisions related to certain public use determinations and refuses to address the particular issues in the present case.

The central fallacy in the HRA's standard of review argument is that it fails to recognize that the Walsers have two distinct substantive challenges to the taking. First, the Walsers contend, and the record confirms, that the Interchange West area simply was not "blighted" and, therefore, the HRA does not have the statutory authority to take the Walsers' property. The second, distinct contention is that the condemnation is not primarily for a "public use" and, therefore, violates established Minnesota law. The distinction between the "blight" and "public use" challenges or, in other words, the jurisdictional and constitutional challenges, is critical because each involves a distinct standard of review. The HRA's failure to distinguish between these two aspects of the case is fatal.

### A. The Constitutional Question Requires An Independent Judicial Determination.

There are numerous decisions holding that when the government condemns private property for a public purpose, its finding of public purpose will be accorded considerable deference by the courts. The HRA cites many of those decisions. This does not mean, however, that the HRA has the ultimate authority to determine whether the taking is for a public purpose. As the United States Supreme Court has observed, "it is well-established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, *the question of what is a public use is a judicial one.*" *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) (emphasis added). This Court has confirmed the fundamental principle that it is for the courts to determine the existence of a public use:

> "A legislative declaration of public purpose is not always controlling. In the final analysis, the courts make the final determination."

*Groppoli*, 202 N.W.2d at 374. The HRA relies on *Berman v. Parker*, 348 U.S. 26 (1954), for the proposition that the elimination of blight may be a proper public purpose for a taking. No one disputes that point; the question, however, is whether there is an adequate evidentiary basis to support the allegation of blight. Indeed, the Court in *Berman* acknowledges that "each case must turn on its own facts." 348 U.S. at 32.

This is not a "normal" condemnation case, in the sense that unlike takings for roads, parks, schools, etc., the public will not even be allowed to use the property that is being condemned. On the contrary, the government is taking the property from one private business and donating it to another, favored private business.[11] As these kinds of "land grabs" have become increasingly controversial, a number of courts around the country have adopted a "heightened scrutiny" standard in condemnations that involve a substantial private benefit. *See, e.g.*, *Tolksdorf v. Griffith*, 626 N.W.2d 163, 168 (Mich. 2001); *City of Atlantic City v. Cynwyd, Inv., Inc.*, 689 A.2d 712, 721 (N.J. 1997); *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 231 (Del. 1987).

---

[11] The redevelopment agreement between the HRA and Best Buy (Ex. 22) provides that Best Buy will "front" the acquisition costs and then be repaid by the HRA out of any tax increment financing proceeds that are available.

Other states have not formally adopted a heightened scrutiny standard, but have indicated that they will look more closely at such condemnations. *See, e.g.*, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 2001 WL 811056 (C.D. Cal. June 26, 2001); *Gohld Realty Co. v. City of Hartford*, 141 Conn. 135, 148, 104 A.2d 365 (Conn. 1954); *City and County of Denver v. Block 173 Associates*, 814 P.2d 824, 829 (Colo. 1991); *Chimney Rock Irrigation Dist. v. Fawcus Springs Irrigation Dist.*, 359 N.W.2d 100, 102 (Neb. 1984).

In Minnesota, the courts have not adopted a heightened standard of review, but they have required – in cases where there is a substantial private benefit from the condemnation – that the "primary" or "predominant" purpose being served is public, not private. *City of Duluth v. State,* 390 N.W.2d 757, 764 (Minn. 1986) ("As long as the predominant purpose being furthered is a public one, the condemnation is constitutional. . . ."); *Groppoli*, 295 Minn. at 7. The applicable statute requires the Court to review "*all* competent evidence" on this issue. Minn. Stat. § 117.075 (1997) (emphasis added).

In the present case, the evidence overwhelmingly demonstrated that the primary beneficiary of this project was Best Buy, and not the public. (*See* App. Br. at 26-27.) *Yet both the trial court and the Court of Appeals failed to make any comparative analysis of the public and private benefits.* The trial court merely found that "the taking is for a public use," and the Court of Appeals concluded that "the district court did not clearly err in finding that the taking was for *a* public purpose" (emphasis added). (App. Br. at A-14 and a-53.) This approach was erroneous and incomplete as matter of law. Even if, *arguendo*, there had been proof of blight in this case, Minnesota law still

requires the courts to consider and to weigh the resulting public and private benefits. The courts below failed to comply with this requirement. This failure is particularly disturbing where, as here, no one has ever contended that the Walsers' property itself was blighted, and the HRA simply included it in the Interchange West district because, ultimately, Best Buy wanted the property, even though it was never even alleged that the south 40 percent of the area was substandard. *See Walser II,* slip op. at 19-20.

As set forth in Appellants' Brief at 30-32, the trial court's review of the public purpose issue was excessively deferential to the point of being a mere "rubber stamp." On appeal, it is the duty of the courts to review the trial court's findings under a "clearly erroneous" standard of review. *City of Duluth v. State,* 390 N.W.2d 757, 765 (Minn. 1986). The overly narrow and erroneous standard of review employed by the trial court (e.g., its failure to consider the "primary" public purpose test), however, is an issue of law that should be reviewed *de novo.*

* * *

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

---

The Housing and Redevelopment Authority for the City of Richfield, a public body corporate and politic under Minnesota law,

Petitioner,

v.

Walser Auto Sales, Inc., et al.,

Respondents.

**TRIAL VOLUME II**

File No.: CD 2604

---

The above-entitled matter came duly on for hearing before the Honorable Gary Larson, one of the Judges of the above-named Court on **December 5, 2000**, in Courtroom 1655, at the Hennepin County Government Center, Minneapolis, Minnesota.

* * *

[278] TESTIMONY OF JOHN STARK

Q. And the Best Buy project is going to generate significant amounts of additional traffic; correct?

A. Yes, it is.

* * *

[396] TESTIMONY OF DAVID PHILLIPS

Q. And, finally, with respect to the blight issue. Could you give – please describe your general observations regarding the project area?

A. For the project area you really have kind of two halves.

You have the north half that is an area of 67 homes. Driving through the area the homes are attractive. They are on generally well-kept areas. In fact, I'm surprised how good they look considering the – I mean, if I owned one of those homes I might not have painted it in the last three years.

But you have homes that are well-kept, well-served. They have good public streets. You have toward the east side of the project in particular duplexes just on the south of 77th. You have – you have some brick apartment buildings, some are two-and-a-half stories, some are two stories and all those facilities are in good appearance.

To the far east of the far project area you have some smaller one-story commercial properties. And then obviously on the south end [397] you have – or had three large car dealership facilities, but in general the area is well-kept.

Q. Based on your curb-side inspections and the review of the YHR reports, what if any evidence did you see of dilapidation in the project area?

A. None.

Q. What if any evidence did you see of obsolescence in the project area?

A. None. There were – there were buildings that were not new, which is not the same as obsolescence.

Q. Did you see any evidence of obsolescence that would be detrimental to the safety, health, morals or welfare of the community?

A. No.

* * *

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Case Type: Other Civil

---

Walser Auto Sales, Inc., Robert J. Walser, Motorwerks, Inc., Paul Walser, and Andrew Walser

Plaintiffs,

v.

City of Richfield, a Minnesota municipal Corporation, and the Richfield Housing and Redevelopment Authority, a public body Corporate and politic,

Defendants.

Court File No.
AP 00-11927

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT**

---

* * *

The above-entitled proceeding came on for trial before the undersigned Judge of this Court in the Hennepin County Government Center, Minneapolis, Minnesota, on December 26 and 27, 2000, pursuant to the claims raised in Plaintiffs Walser Auto Sales, et al.'s ("Walser" or "Plaintiffs") Complaint.

Plaintiffs appeared by its attorneys Bradley J. Gunn and Bruce D. Malkerson. Defendants City of Richfield ("City") and Housing and Redevelopment Authority in and for the City of Richfield ("HRA") (collectively "Defendants")

appeared by its attorneys, John M. LeFevre, Jr., and Joe Y. Yangh.

That Defendant brought a motion requiring the Plaintiff to post a bond in order to proceed. The Court reserved the motion.

That both the Plaintiffs and Defendants submitted Summary Judgment motions to be heard by

* * *

35. That YHR itself found that the properties in the Project Area are generally in good condition and cannot be considered run-down.

36. That the evidence at trial demonstrated that the costs of achieving code compliance used by YHR may be excessive.

37. That the evidence at trial demonstrated that the replacement costs used by YHR may be too low.

38. That the properties in the Project Area are generally in good condition.

---